TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 432

CHICAGO GREAT WESTERN RAILROAD COMPANY, PETITIONER,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR CERTIORARI FILED JUNE 3, 1925.

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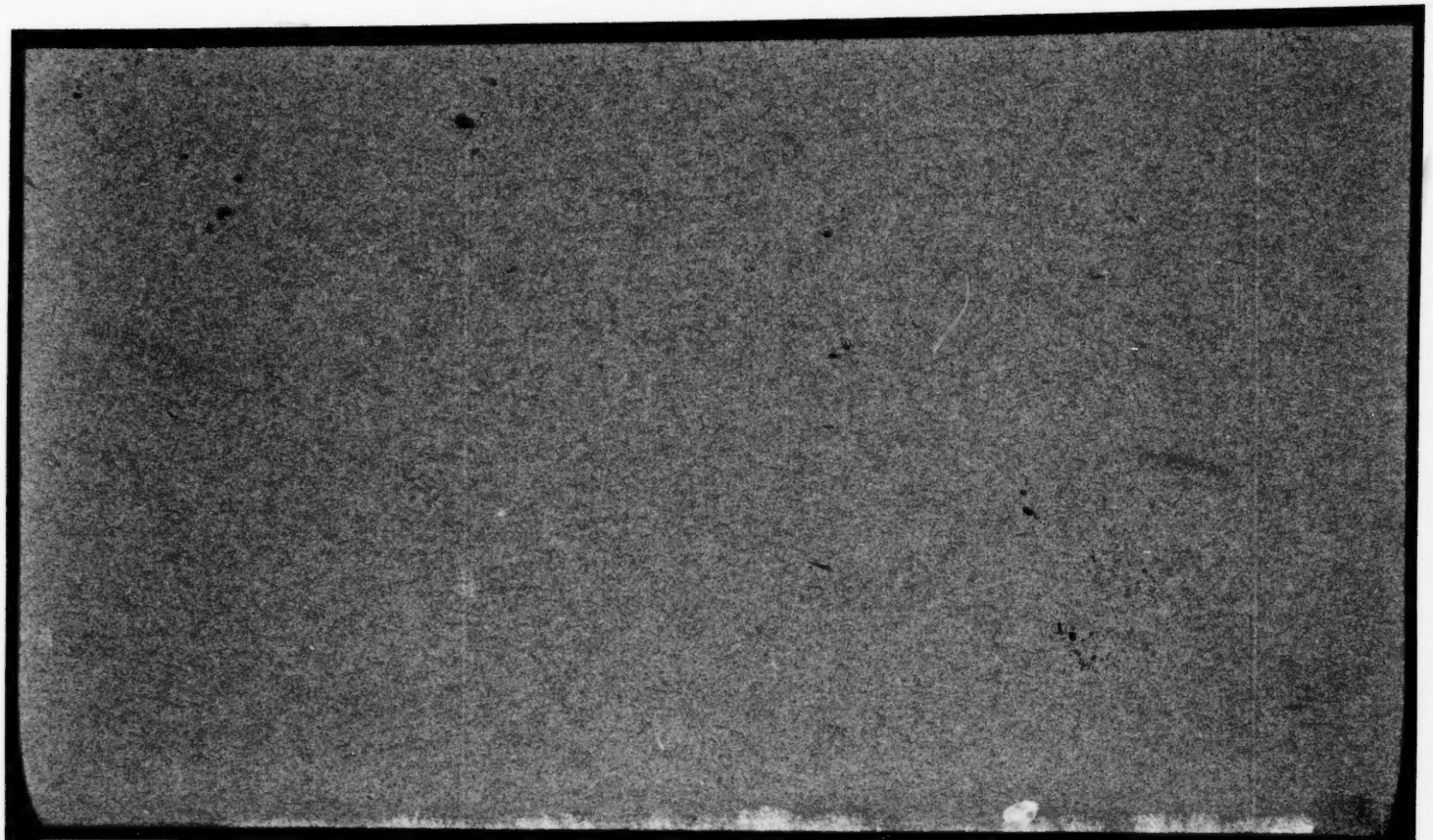

(30,385)

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1

STATE OF MINNESOTA

SUPREME COURT.

STATE OF MINNESOTA, DISTRICT COURT,
COUNTY OF YELLOW MEDICINE.

2

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,

Plaintiff,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY,

Defendant.

3

COMPLAINT.

Plaintiff, for a complaint in the above entitled action, alleges and shows to this court:

1st: That the defendant now is and at all times hereinafter mentioned has been a railroad corporation duly organized, existing and as such operating a commercial line of railroad and carrying freight and passegers thereon as a common carrier for hire, in the states of Iowa, Minnesota and other states.

2nd: That on or about the 19th day of October,
4 1922, the above named decedent, Edmund Ludwig Ring, died intestate and left him surviving his widow, Ottilia Ring, and his son, Leonard Edmund Ring; that thereafter and previous to the commencement of this action the above named plaintiff, A. D. Schendel, was by the Probate Court of Hennepin county, Minnesota, a court having jurisdiction, duly appointed as Special Administrator of the estate of said Edmund Ludwig Ring, decedent; and that said A. D. Schendel duly gave
5 bond as such Special Administrator, and in all things qualified as such, and is now the duly acting and qualified Special Administrator of said estate, and as such, brings this action for and in behalf of said Ottilia Ring and Leonard Edmund Ring aforesaid, both of whom were dependent upon the decedent for their care, support and maintenance at the time of his death.

3rd: That on and previous to the 4th day of October, 1922, the above named Edmund Ludwig
6 Ring was employed by the defendant as its agent and servant as a railroad freight brakeman, and as such railroad freight brakeman, it was his duty to be on, around and about the railroad freight cars of the defendant, and that he had such duties as are common to railroad freight brakemen generally.

4th: That at the time of the injuries to and the death of decedent, as herein alleged, the defendant was an interstate railroad and engaged in interstate commerce, and the decedent was working for

the defendant as its agent and servant, and as such was engaged in interstate commerce at said time.

5th: That on or about the 4th day of October, 1922, while decedent was employed as aforesaid, it became and was necessary for him, and it was his duty to act as a railroad freight brakeman on one of the railroad freight trains of the defendant running through the village of Budd, Iowa; that at said time defendant kept and maintained at said village of Budd, Iowa, certain main, house and side tracks, so-called, for its use as a common carrier of freight and passengers for hire; that on or about said 4th day of October, 1922, at about eight o'clock P. M., this decedent was employed in switching and moving certain railroad freight cars of the defendant in said yards, and in such switching operations it became and was necessary to uncouple certain cars, in order to carry out said switching movement; that at said time, and previous thereto, the defendant negligently, recklessly and carelessly, had, kept and maintained on one of the cars, which was so to be uncoupled, a certain draw bar, coupler and coupling apparatus which was broken, defective, unworkable and inoperative, and in such condition that said draw bar, coupler and coupling apparatus could not be operated and cars could not be caused to couple thereto, or uncouple therefrom, without the necessity of a person's going between the ends of said cars; that because of said car being so equipped with such broken, defective, unworkable and inoperative draw bar, coupler and coupling appar-

atus it became and was necessary for the said car
10 to be fastened by means of a chain to another car next adjacent to it in said train; that it became and was the duty of decedent to go between the cars of said train at the end of said car upon which said chain was so fastened, while said train was so in the yards of the defendant at said village of Budd, Iowa, and unloosen said chain so as to fasten, uncouple and disconnect the said cars, so that the said car, so equipped with said broken, unworkable and inoperative draw bar, coupler and
11 coupling apparatus might be removed from said train; and that while decedent was so attempting to unloosen, unfasten, disconnect and remove the said chain aforesaid, and while he was between the ends of said cars, the same came together, crushing him and causing such severe injuries that he died immediately thereafter.

6th: That previous to his death the decedent was an able-bodied man, well, strong, healthy and vigorous and could and did earn approximately
12 two hundred ($200.00) dollars per month; and that by reason of his death, damages have resulted to plaintiff, as the Special Administrator of the estate of said Edmund Ludwig Ring, deceased, in the sum of thirty-five thousand ($35,000.00) dollars, which said decedent would have contributed to his widow, Ottilia Ring, and to his child, Leonard Edmund Ring, had he not come to his untimely death, as hereinbefore set forth.

For a second and further cause of action herein plaintiff alleges and shows to this court:

1st: Plaintiff re-alleges each and every allegation, matter and thing contained in paragraphs 1st, 2nd, 3rd, 4th and 5th of plaintiff's first cause of action herein.

2nd: Plaintiff alleges that after the said decedent was so injured on the 4th day of October, 1922, he survived and was conscious for a period of approximately fifteen days; that during said time the said decedent suffered great and severe pain and agonies of both mind and body from the time of being so injured to the time of his death; and that by this action this plaintiff, as the Special Administrator of the estate of said decedent, seeks to recover for and in behalf of said Ottilia Ring and Leonard Edmund Ring, the sum of fifteen thousand ($15,000.00) dollars, as damages compensatory for the conscious pain and suffering to decedent from the time of said injuries to the time of his death.

Wherefore, plaintiff demands judgment for the sum of fifty thousand ($50,000.00) dollars, together with the costs and disbursements of this action.

PAUL D. STRATTON,
Plaintiff's Attorney,
Granite Falls, Minnesota.
DAVIS & MICHEL,
Plaintiff's Attorneys,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

16

(Title of Cause.)

ANSWER.

Now comes the above named defendant and for its answer to the complaint of the plaintiff herein, denies each and every allegation, matter and thing therein contained, save and except as hereinafter specifically admitted.

Defendant admits that it is a corporation and a

17 common carrier of passengers and freight for hire.

Wherefore, defendant prays judgment that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements herein.

BRIGGS, WEYL & BRIGGS,
Attorneys for Defendant,
915 Merchants Bank Bldg.,
St. Paul, Minnesota.

18

(Title of Cause.)

AMENDED ANSWER.

Now comes the above named defendant and for its amended answer to the complaint herein, denies each and every allegation, matter and thing therein alleged, save and except as hereinafter specifically admitted.

Defendant admits that it is a corporation and a common carrier of passengers and freight for hire.

Further answering defendant alleges, that deceased, Edmund Ludwig Ring, was a man of average intelligence, thoroughly conversant with his duties and the property and equipment of the defendant. That all of the risks incident to his employment were open and obvious; that he selected whatever position he took and he himself determined where he should be and how he should perform his duties, and that if his death was the result of injury the same was due to and caused solely by his own negligent acts and omissions and because of risks which he assumed.

Wherefore defendant prays judgment that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements herein

BRIGGS, WEYL & BRIGGS,
Attorneys for Defendant,
915 Merchants Bank Bldg.,
St. Paul, Minnesota.

22 (Title of Cause.)

REPLY.

Plaintiff for his reply to the answer of the defendant in the above entitled action alleges and shows to this court:

Plaintiff denies each and every allegation and each and every part thereof in said answer contained except as the same admits the allegations contained in plaintiff's complaint.

23 Wherefore, plaintiff demands judgment as prayed for in said complaint.

Dated this 16th day of December, 1922.

DAVIS & MICHEL,
Plaintiff's Attorneys,
419 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

(Title of Cause.)

24

SETTLED CASE.

The above entitled action was called for trial on June 21, 1923, at the court house in the city of Granite Falls, Minnesota, before Hon. Harold Baker, J., and a jury.

Davis & Michel and Paul D. Stratton appeared for the plaintiff.

Briggs, Weyl & Briggs and B. O. Lee appeared for the defendant.

A jury of 12 was duly impaneled and sworn, and the opening statement on behalf of the plaintiff 25
made by Mr. Davis.

Mr. Briggs: I object to the reading of the complaint as improper.

Mr. Davis: Then I will not read it.

It is stipulated by and between the parties to the above entitled action that A. D. Schendel, of Hennepin county, Minnesota, is the duly appointed acting special administrator of the estate of Edmund Ludwig Ring, and that said Schendel is the plaintiff in this action. 26

Mr. Davis: The deposition of Mr. O'Leary, the conductor who was in charge of that train, was taken last January at St. Paul, and it is agreed to be read the same as though he were present and a witness in court, and it is testimony which the jury will have to take into consideration along with the other testimony in the case.

(Read to the jury as follows):

J. P. O'LEARY, 27

being first duly sworn on oath according to law, testified as follows, to-wit:

DIRECT EXAMINATION.

By Mr. Davis:

Q. State your full name.

A. J. P. O'Leary.

Q. Where do you live, Mr. O'Leary?

A. I live at 712 South Frederick street, Oelwein, Iowa.

Q. Are you employed by the Great Western
28 Railroad Company at that point?

A. Yes, sir.

Q. In what capacity are you employed by the Great Western?

A. Freight conductor.

Q. How long have you been a freight conductor?

A. A little over twenty years.

Q. What is your run?

A. I run between Oelwein, Iowa, and East
29 Stockton, Illinois.

Q. That is, you leave Oelwein, Iowa, on one end of the line and the other end of your line is East Stockton, Illinois?

A. Yes.

Q. And then there is a return trip you make?

A. Yes.

Q. And your train consists of freight shipments?

A. Yes.

30 Q. And express?

A. No express.

Q. And on the date in question, the fourth day of October, 1922, that was the date Mr. Ring was injured?

A. Yes, I believe it was.

Q. And were you then in charge of the freight train?

A. Yes, sir.

Q. From what point to what point?

A. From East Stockton to Oelwein.

Q. From East Stockton, Illinois, to Oelwein,
Iowa? 31

A. Yes.

Q. And that train of which you were in charge was carrying freight from points outside of Iowa into Iowa?

A. Yes

Q. And the station of Budd, Iowa, did you arrive there at about eight o'clock in the evening?

A. About 7:30.

Q. About how many cars were in your train?

A. I don't remember the exact number. I think 32
about forty.

Q. Consisting of freight shipments?

A. Yes.

Q. Some loads and some empties?

A. I think nearly all loads.

Q. And Mr. O'Leary, when you got into Budd, or the siding at Budd, did you discover, or was it before that that you discovered a car with the draw-bar out?

A. That was before we got onto the sidetrack. 33

Q. And where did you discover this car with the draw-bar pulled out?

A. We stopped to head in at Budd to meet an east-bound train and in starting we pulled the draw-bar out.

Q. The draw-bar was pulled entirely out?

A. No; the timber was broken and it allowed it to pull out half way out.

Q. And when you discovered that what did you do?

A. I sent this brakeman Ring—the train stood

on a reverse curve at the time,—and I sent this
34 brakeman Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the sidetrack.

Q. And after that what was done?

A. Well, we done that. We backed up and put the chain on this car and pulled the rear end of the train into the sidetrack.

Q. And did Ring act under your directions in helping to chain up the draw-bar of this car?

35 A. Yes, sir.

Q. And then you pulled it up on to the sidetrack?

A. Yes.

Q. After you did that, did you have any other work with regard to this draw-bar?

A. Yes. I told Ring and told the rear brakeman after we pulled the train in, we would switch it out of the train.

Q. And did Ring have anything to do with this
36 draw-bar after you got it into the sidetrack?

A. After we got on the sidetrack I was in the rear end of the train and Ring was up by this car that had the draw-bar out and I got out and walked up to a car length from where he was and I asked him if he could unhook the chain and he said he didn't know, and he set down his lantern and he tried and he couldn't do it.

Q. And then what happened?

A. And I told him to let me try, and I couldn't unhook it. It was a heavy chain and one

man couldn't handle it, and he climbed over the end of the car and got on the other side, so I was 37
on one side of the draw-bar and he was on the other, and he was facing the east and he reached down to lift up the chain to give the slack to me so I could pull the chain, and the train backed up.

Q. Did the train back up without giving you any signal?

A. Yes, sir.

Q. And what happened to Mr. Ring?

A. I straightened up and walked back with the movement of the train and he reached in and 38
locked his arms around the axle of this bad-order car and this chain at the time was slack in there and wasn't unhooked, and he swung his body up over the chain and held back and the slack ran back and squeezed him between the chain and the bottom of the draft-timbers of this car.

Q. Now, then, when this train jerked back, you and Ring were both in there trying to unhook this chain?

A. Yes. 39

Q. And no warning was given that the train was coming back?

A. No.

Q. And you were in charge of the train as conductor?

A. Yes, sir.

Q. And you gave no signal to back up?

A. No.

Q. Had you given any directions to them not to back up until you had unhooked the chain?

A. No.

Q. Did you notify the engineer or fireman that
40 you were going in there to unhook the chain?

A. No.

Q. Mr. Ring was working there under your directions?

A. No. He went in there on his own accord.

Q. Well, you were conductor of the train?

A. Yes.

Q. And he was working under you?

A. Yes, sir.

Q. And if he went in there to unhook the chain
41 before you moved the train it would be your duty to tell him to get out?

A. Yes, sir.

Q. And he was in there working with you and doing whatever you suggested he should do, wasn't he?

A. Yes.

Q. And you were his superior as conductor? He was your brakeman?

A. Yes, sir.

42 Q. And when this train moved back, did it move back suddenly?

A. No, it started slow and moved back.

Q. In what position was Mr. Ring when it started back? Was he in a position so he could get out at the start when the train moved backward?

A. My idea would be to get out of there.

Q. I understand, but he was over the chain?

A. Yes.

Q. And the train started to run back?

A. Yes.

Q. And then how far did that train move back?

A. Well, I judge it ran back a car length. 43

Q. About 40 or 42 feet?

A. Well, about forty feet.

Q. Yes. The average small car. And when it was moving about how fast was it moving back?

A. Not very fast. Probably, oh, as fast as a man would walk now. Probably two miles an hour I would say.

Q. Now, was Mr. Ring's feet on the ground as it was moving back, or off the ground?

A. Before he swung up on the chain they were 44 dragging on the ties.

Q. The movement of the train dragged his feet along on the ties?

A. No; that was after he locked his arms around the axle.

Q. And did he lock his arms around the axle about the time the train started?

A. Yes, sir.

Q. And then after that his feet were dragging along the ties? 45

A. Yes, sir.

Q. Then he reached further forward in order to raise himself?

A. No.

Q. Was that the way he was carried until the train stopped?

A. No.

Q. Well, then, when was his position changed?

A. He dragged a short distance and then swung his body up over the chain.

Q. His feet were dragging over the ties for a
46 short distance and then he swung his body up over the chain?

A. Yes. He put one leg up first and dragged himself up over the chain.

Q. The train was moving during all that time?

A. Yes, sir.

Q. And about how far had it moved when he swung his body over the chain?

A. Not very far. Just a short distance.

Q. And he was carried the balance of the dis-
47 tance until the train came to a stop?

A. Yes.

Q. And when it came to a stop the chain which was around this defective draw-bar came up with a snap?

A. Yes, sir.

Q. And that caught him about the center of the body, say the abdomen, or stomach or bowels?

A. Yes.

Q. And was the chain the thing that caught
48 him on the abdomen?

A. Yes.

Q. You understand the slack of the chain was in that shape (indicating a sagging position) and when it pulled out it straightened out.

Q. It pulled taut?

A. Yes.

Q. And that pulled against his abdomen?

A. Yes.

Q. Now, he was caught between the chain and what?

A. The bottom of the draw-bar.

Q. And that would be on his back?

A. Yes.

49

Q. So there were two things that caught his body?

A. Yes.

Q. First there would be the chain that came upon his abdomen—

A. Yes, as it pulled tight.

Q. —and the other would be what?

A. The bottom of the draft-timbers.

Q. Which would be a very heavy and substantial thing would be on his back?

50

A. Yes, sir.

Q. Then what happened?

A. Well, he hollered when the slack came up and then came the rebound after it drew up, by letting the slack come back, and he rolled off the chain.

Q. Between the two cars?

A. Yes, sir.

Q. Was the train moving then?

A. No.

51

Q. What did he then do?

A. I got over on the other side that he was on and got hold of him and I assisted him or helped him to the bank.

Q. What did he say?

A. He didn't say much. He kind of groaned or grunted.

Q. Was he in pain?

A. He was out of breath.

Q. Did he finish his run?

A. No.

Q. What was done with him?

52 A. I left him in charge of this brakeman, Quist, and I took the engine and went around to the rear end and switched the caboose out and this bad-order car and came out on the main line and put Ring in the caboose, and then I went to the telephone booth on the east side of the track and got train orders to take him back to Dubuque.

Q. How far were you from Dubuque?

A. I don't know just how far. Probably eight, ten or twelve miles.

53 Q. Now, this defective draw-bar—is that part of the safety appliance part of the train?

A. What?

Q. This defective draw-bar was part of the safety appliance part of the train, wasn't it? You know what that is.

A. Yes, it was.

Q. You are familiar with the general safety appliance requirements?

A. Yes.

54 Q. And this was one of them?

A. Yes.

Q. And this was in a defective condition when it broke out?

A. Yes, sir.

Q. And it was necessary in order to use it at all to chain it up?

A. It was necessary to put a chain on the car to move it.

Q. And when did you first discover this defective draw-bar?

A. When we started the train at Budd.

Q. Budd, Iowa? 55

A. Yes.

Q. And what direction was your train headed?

A. It was headed west.

Q. Were you ready to go out of Budd, and had you done any switching at Budd before you discovered it?

A. No.

Q. Did you have any switching to do there?

A. No.

Q. It was just a small station and you had no 56
switching to do there?

A. No.

Q. And were you pulling in on the main line when you first discovered it?

A. I was pulling in on the sidetrack for this east-bound train.

Q. And you discovered this before you got on to the sidetrack?

A. We stopped to open the switch to get on to the sidetrack and when we started the train part- 57
ed, and Ring and I went over to see what the trouble was and we found this draw-bar.

Q. You were on the main line then?

A. Yes.

Q. And it was chained up there?

A. Yes, on the main line.

Q. And it was your purpose after chaining it up to pull on to the sidetrack to let the east-bound train pass?

A. Yes, sir.

Q. And it was while you were moving this car
58 with the defective draw-bar that Mr. Ring was injured on the sidetrack?

A. Yes.

CROSS-EXAMINATION.

By Mr. Weyl:

(Read by Mr. Briggs):

Q. Was there anything wrong with your train up to the time that you stopped at Budd for the purpose of going on the sidetrack?

59 A. No.

Q. As I understand it, the reason you stopped on the main line at Budd was to throw the switch so you could go on to the passing track?

A. Yes.

Q. And up to that time what had been the apparent condition of this draw-bar?

A. It was in apparent good condition.

Q. There had been no trouble with it before that?

60 A. No.

Q. Then when your train started up to go on to the passing track what was it that indicated to you that there was some trouble on the train?

A. I heard the air go into emergency.

Q. Was that when you and Ring went to find out what the trouble was, immediately after?

A. Yes, sir.

Q. Now, up to that time did you have any chain —did you use this chain you have testified to, to hold any of the two cars together?

A. No, sir.

Q. Had the train broken in two when you started up to go on to the passing track?

61

A. Yes.

Q. And the engine and cars attached to it pulled away from the car that had the defective draw-bar?

A. Yes, sir.

Q. And what was the next movement of the train?

A. The next movement was to get a chain and put it on the draw-bar of the car that was attached to the engine—the last car that was attached to 62 the engine part of the train, and back up and chain it, and put the other end of the chain on to the bad-order car—that was the idea.

Q. And that was done?

A. Yes.

Q. And then the train moved where?

A. It moved from the point where the draw-bar was pulled out into the sidetrack.

Q. How much of a distance would you say that was?

63

A. Well, we will say it was fifty car lengths, maybe more or maybe less.

Q. When your train stopped for the first time was the engine close to the switch to the passing track?

A. Yes, it was close to the switch.

Q. Then the train when it was chained together, the engine was backed to that point again, was it?

A. Yes.

Q. And when you moved after the chaining of
64 the two cars together the engine simply moved from that point near the switch right on to the passing track with the rest of the train?

A. Yes, sir.

Q. Now, you have testified that after you got on to the passing track and the train stopped you attempted to unhook the chain?

A. Yes.

Q. What was the purpose of unhooking the chain at that time?

65 A. Because I couldn't take the car in the train further in that condition. I had to get it out of the train in some way, and that chain had to be unhooked to get it out of the train.

Q. And in order to get the car out of the train, what would be the movement of the engine in order to do so?

A. I figured on bringing her to the rear end and headed into the caboose.

Q. But to get the engine to the rear end of the
66 train it had to do what?

A. It had to be cut off and brought down the main line.

Q. And it had to be cut off and go on the passing track to the main line—

A. Yes.

Q. And then come back on the main line to pass the switch of the passing track?

A. Yes.

Q. Then throw the switch?

A. Yes.

Q. And the engine was moved then on to the passing track and hooked on to the caboose? 67

A. Yes.

Q. And then backed out to the main line again?

A. Yes.

Q. And then what would you have to do in order to complete this movement, if anything?

A. Well, here is the caboose here (indicating) We would go up and hook on to it. In order to get the bad-order car out you would have to unhook the chain that coupled it to the head of the train and pull it back and throw it out on the main 68 line—this bad-order car I mean.

Q. Then the engine would push the caboose and the other two or three cars attached to it back to the passing track and couple on to the rest of the train standing on the passing track?

A. Yes, then the train would be intact.

Q. And where was the bad-order car then?

A. That was left out on the main line track.

Q. Then what did you do with the bad-order car? 69

A. Set it in behind the caboose and leave it there.

Q. Now, I believe you have testified to it, but to make sure I will ask you this question: When you were going in to the chain to unhook it, to which you testified on Mr. Davis' direct examination that was the first thing to be done in order to get this bad-order car out of the train?

A. Unhook the chain, yes.

Q. And did you have any other object or purpose in mind at the time you were doing that?

A. No.

70 Q. Do I understand from your testimony, Mr. O'Leary, that at the time you were attempting to unhook this chain that the engine backed up?

A. Well, the train backed up.

Q. What other movement took place up above you don't know?

A. No.

Q. You don't know whether it was slack letting out or a movement on the part of the engine?

A. No.

71 Q. Now, when you assisted Mr. Ring out from between the cars, was he able to do anything for himself?

A. Yes, he made a good effort at getting out himself.

Q. And when you say you assisted him, just what did you do?

A. Well, I took hold of him. I got him under the arms and helped straighten him up and got hold of him and helped him walk out.

72 Q. Were you obliged to carry him?

A. No.

Q. Did he walk?

A. Yes.

Q. And when he got out from between the cars, what did he do then?

A. He rolled around on the ground for a while until he finally got his breath.

Q. Did that seem to be his difficulty at the time?

A. Yes.

Q. Trying to get his breath?

A. Yes. 73

Q. And aside from his trying to get his breath, what did you observe about him?

A. Nothing particular.

Q. And did he talk to you?

A. Yes. I asked him if he thought he was hurt bad.

Mr. Davis: I withdrew that at the time.

A. What was that?

Q. Did he talk to you?

A. Well, I asked him if he was hurt. 74

Q. What did he say?

A. Well, he said he didn't know.

Q. Well, after he went to the side of the right-of-way what did you then do?

A. About this time the other brakeman brought the engine down the main line and I left Ring in charge of Mr. Quist, and I took the engine and went to the rear end and did the switching.

Q. That is, the switching to get the caboose attached to the engine? 75

A. Yes.

Q. And did you also take the bad-order car out at the same time?

A. Yes.

Q. And then did Mr. Ring move from the place where he was to enter any part of the train?

A. Why, he moved when we got this switching done—he walked over and got into the caboose.

Q. And did you help him on to the caboose?

A. I think we did. I think we both had hold of him when he climbed up on the caboose.

Q. When he got into the caboose what did he
76 do?

A. We pulled a bunk down and he lay down on that.

Q. Was there any talk with him at that time?

A. No.

Q. Did you have any talk with him from that time until you got to Dubuque?

A. No.

Q. You went directly from there to Dubuque?

A. Yes.

77 Q. With just the caboose and bad-order car?

A. Yes, sir.

Q. Did he make any sound from the time you left Budd until you got to Dubuque?

A. No. He moved himself around on the bunk we fixed for him, but I didn't have any conversation with him.

RE-DIRECT EXAMINATION BY MR. DAVIS.

(Read by Mr. Davis):

78 Q. Were you in the caboose with him all the time from Budd to Dubuque?

A. Yes, sir.

Q. And had he said anything you could have heard it—you were right there with him?

A. Yes, sir.

Q. And was Mr. Quist there also in the caboose?

A. Yes.

Q. Anybody else?

A. No.

Q. And nothing was said by Mr. Ring while in the caboose?

A. I had no conversation with him.

Q. Did you hear him say anything from Budd to Dubuque? I understand you to say you didn't?

A. I didn't hear him say anything.

Q. And you were riding there in the caboose all the time with him?

A. Yes.

Q. And Mr. O'Leary, he was laying on the bunk —laying stretched out on the bunk?

A. Yes.

Q. And did he at times turn and twist while laying there?

A. Yes.

Q. And at times did he groan?

A. No.

Q. And did you notice his face there while he was laying and twisting in the bunk—its appearance?

A. No, it was dark.

Q. No light in the caboose?

A. Yes, on one end. He was on the other end.

Q. And did he have a pillow under him?

A. Yes, we had a cushion and an old coat.

Q. How long after he was injured did you and Mr. Quist help him into the caboose?

A. Oh, ten or fifteen minutes.

Q. And you both took hold of him as he got into the caboose?

A. Yes.

Q. He didn't get in himself?

A. He could have.

82 Mr. Davis: I didn't ask you that. I move that be stricken.

Q. You helped him—both of you helped him get into the caboose?

A. Yes.

Q. Both of you had hold of Mr. Ring?

A. Yes.

Q. And when this train backed up, how far back was this car that had the draw-bar pulled out, from the caboose?

83 A. It was ahead of the caboose, the fourth car.

Q. And how many cars between that and the engine?

A. I don't remember just how many we had, but if we had forty, it would be thirty-six.

Q. Now, your train had come to a stop before this backward movement?

A. Yes.

Q. And it had remained stopped for some time?

A. Yes.

84 Q. And when this backward movement started it constituted a movement of some forty feet?

A. Something like that.

Q. Now, you know the slack in the train wouldn't bring it that far?

A. Yes. I wouldn't imagine it would start of its own accord.

Q. And after a train has stopped for some time the slack moves out?

A. Well, that depends; sometimes it does and sometimes it doesn't.

Q. After a train has stopped for some length of

time then the slack has run out of the train as a rule? 85

A. Yes, sir.

Q. Now if a freight train comes to a stop it would be a very short time afterwards if any slack would have any effect—it would occur very shortly afterwards?

A. Yes.

Q. And Ring had been in there and you had been in there some time?

A. Yes.

Q. How long after the train had stopped did 86
this backward movement start? Was it five minutes—

A. No. While I walked four or five car-lengths.

Q. And Mr. Ring stepped in and tried to unhook it and you stepped in and tried to as well?

A. Yes.

Q. I will ask you from your practical experience as a railroad man from the nature of that movement, that it didn't occur immediately after 87
the train stopped, if you would not from that fact think it would have to be backward movement of the engine to go back forty feet—wouldn't you?

A. Well, yes.

Q. Did you afterwards have any talk with the engineer about backing the train up?

A. No.

Q. At any time?

A. No.

By Mr. Michel:

Q. That car that had the bad draw-bar, was
88 that Illinois Central car No. 200,549?

A. It was an Illinois Central car, but I do not have a recollection of the number. I had at the time but I haven't now.

Adjournment until 8 a. m. June 22, 1923.

Forenoon, session, June 22, 1923.

ADA GROSS,

was called as a witness on behalf of the plaintiff and duly sworn.

89

DIRECT EXAMINATION.

By Mr. Davis:

Q. Mrs. Gross, where do you live?

A. At Oelwein, Iowa.

Q. You are a sister of Mrs. Ring?

A. Yes, sir.

Q. And were you living in Oelwein, Iowa, in October, 1922, last year?

A. Yes, sir.

90 Q. Mrs. Gross, do you remember the time that Ed. Ring was hurt? Was you home in Oelwein when he was hurt?

A. Yes.

Q. And did you know him in his life time?

A. Yes, I did.

Q. And did you visit at his home?

A. Yes, I did.

Q. Mrs. Gross, when he came from the hospital at Dubuque to his home, was it on a Friday that he got home from Dubuque?

A. Yes, on Friday after he was hurt he came home from Dubuque.

91

Q. Were you at his home on that Friday?

A. Yes, I was.

Q. Did you see him there.

A. Yes, sir, I did.

Q. After he got hurt were you in his house?

A. Yes, I was.

Q. And was you there in the evening?

A. Yes.

Q. You may state to the jury whether or not you saw him?

92

A. Why, I seen him when he first came home from the train, and then later on in the evening I seen him when he was in bed.

Q. Was your sister at home with him then?

A. Yes.

Q. How late that first night did you stay at his home where Mr. Ring was?

A. Until one o'clock.

Q. Now during that night, I wish you would tell the jury what his condition was, what he did, if anything, and how he looked? Just tell the jury in your own language how he looked and what he did?

93

A. Why he was suffering pain, and he lay on the bed—

Mr. Briggs: I move to strike out his suffering pain as not responsive to the question.

Court: It may be stricken.

Q. Just state what he did, you can't state your conclusions, but what he did?

A. Why, he laid on the bed and put his hands

up to his side in that condition he would roll him-
94 self.

Q. He would roll himself?

A. Yes, he did.

Q. Did he groan at times?

A. Yes, he did.

Q. During the time you was there you say he would put his hands up to his side?

A. Yes, he did.

Q. Where did he put his hands?

A. Up like this (indicating), over his stomach.

95 Q. Abdomen?

A. Yes, sir.

Q. Did you notice whether or not he had any difficulty in getting his breath, in taking a deep breath?

A. It was very hard for him to breath.

Q. You stayed there that night until about one o'clock?

A. Yes, sir.

Q. And then you went home?

96 A. Yes.

Q. The next day would be Saturday, I believe?

A. Yes.

Q. Were you over there Saturday?

A. Yes, sir.

Q. With regard to his condition then, you may state whether he was up all the time you were there, or part of the time out of bed and part of the time in bed?

A. He was up an hour or so in the afternoon

Q. Of Saturday?

A. Yes, late in the afternoon.

Q. On Sunday did you see him? 97

A. Yes, I did.

Q. And did you see him Monday?

A. Yes, sir, I did.

Q. Now then on Monday night were you there?

A. Yes, sir, I was.

Q. How late were you there on Monday night?

A. I stayed there nearly every night until 12 and one o'clock.

Q. On Monday night did anything occur there in regard to his condition? 98

A. Yes, sir, he was very sick on Monday night, and started in to vomiting.

Q. Started in vomiting?

A. Yes, sir.

Q. From the time he got home on Friday up to Monday night you may state whether at the time that you were there he put his hands up to his side or in front of him, as you say?

A. Yes, he did.

Q. And showed pain. Was there any difference as to his— 99

Mr. Briggs: I object to the question "showing pain" and move to strike that part out.

Mr. Davis: We will consent it may be.

Q. On Monday night you say he vomited, what did he vomit?

A. He vomited bile mixed with blood.

Q. Bile mixed with blood?

A. Yes, sir.

Q. When he vomited you may state to the jury what he did in regard to where he put his hand.

You can't state what he said, you understand, Mrs. Gross, but just what he did?

100 A. He put his hand up to his—and he would vomit, and in doing that in order to throw the vomit he would lie on the edge of the bed, and he wouldn't be able to get himself on the pillow.

Q. Did he make any sounds as to whether or not he was having pain?

A. Yes, sir, he did.

Q. What did he do, just tell the jury?

A. Why, he would moan when he would vomit,

101 as if it would strain him, and it was so hard for him to get his breath.

Q. Did you see him on Tuesday evening?

A. Yes, sir, I did.

Q. Was his condition any better that day?

A. No, sir, it remained the same.

Q. Did you notice whether or not he vomited on Tuesday?

A. Yes, sir, he did, I seen the same thing on Tuesday several times.

102 Q. Were you helping your sister?

A. Yes, sir, I was.

Q. She had a little baby in the home about a year old, didn't she?

A. Yes, they had.

Q. Now Mrs. Gross, on Wednesday were you there?

A. Yes, I was.

Q. On Thursday?

A. I was.

Q. And Friday?

A. I was.

Q. He left on Friday did he not? 103

A. No, he left on Sunday.

Q. On Saturday were you there?

A. Yes.

Q. On Sunday he left did he?

A. Yes.

Q. Sunday morning?

A. Sunday noon.

Q. And then from Friday around to the next Friday—about nine days he was home there?

A. Yes, he was. 104

Q. Now then, from the time he started to vomit on Monday, vomit blood, Monday night, did his condition get worse as time went on?

A. Yes, sir, daily.

Q. And during the times you were there nights, say until you left at 12 or one o'clock, how did he sleep, if at all?

A. He did not sleep at all.

Q. What would he do?

A. Why he would roll on the bed, as he could 105 not get any rest.

Q. Could you tell from observing his condition and actions whether he was suffering any pain?

A. Why I—

Mr. Briggs: Yes or no.

Q. Could you tell from seeing him whether he was suffering pain?

A. Yes, sir, I could.

Q. Tell the jury what he did that indicated pain, just tell the jury?

A. Why he was sore and uncomfortable, I
106 could tell by looking at his face that he was suffering pain.

Q. What was there about his face that indicated that?

A. Why his face was drawn to an extent that I could tell that he was suffering pain.

Q. Did he toss about on the bed?

A. Yes, sir, he did.

Q. Did he direct you to different things there, different matters?

107 A. No, he didn't.

Q. Was he conscious all the time he was in the house?

A. Yes.

Q. And then he left on a Sunday?

A. Yes, sir, he did.

Q. And you never saw him after that?

A. No, I didn't.

Q. —alive?

A. No, I didn't see him alive.

108

CROSS-EXAMINATION.

By Mr. Briggs:

Q. Did you know whether Mr. Ring was out of his house after he came home until he went back to Dubuque?

A. Just outside?

Q. Well, outside of his house at all?

A. Yes, I think he was.

Q. When?

A. Well, probably on a Monday.

Q. Do you know what he did?

A. Why I don't think more than just walked around the house.

Q. Outside, you mean, of the house?

A. Yes.

Q. You don't know of his being outside except for that walk around the house?

A. No, not that I know of.

Q. Not that you know of?

A. No.

Q. Have you heard of his being out?

Mr. Davis: Objected to as immaterial and hearsay, and not proper cross-examination.

Court: Objection sustained.

Q. How long were you at his house on Sunday?

A. Why, I was there until midnight.

Q. From what time of day to midnight?

A. Yes.

Q. What time in the day did you go there?

A. Why I would go there different times in the day.

Q. What time of day did you go there Sunday?

A. Oh, I might have been there five—six times on Sunday, at different times.

Q. Well, how long did you stay each time?

A. Oh, probably half an hour, and when I would go there in the evening I would go there when I would get my work done in the evening, and I would stay until midnight.

Q. What time in the evening did you go?

A. Seven o'clock.

Q. And then you stayed until midnight?

A. Yes, sir.

Q. He was up and around the house during
112 the day?

A. Sunday?

Q. All those times, all those days?

A. Why, he was up a little while in the afternoon.

Q. Were you there so that you would know whether he was up other times or not?

A. Why I had been there several times and he was in bed.

Q. I know, but you weren't there all the time,
113 you don't know but what he was up a good deal of the time when you weren't there?

A. I was not there all the time, no, sir.

Q. How many hours of the day were you there?

A. Why I was there about five hours every evening, and I would think two—three hours during the day.

Q. How did he get home on that Friday?

A. On a train.

Q. Well, how did he come to the house?

114 A. In a taxi.

Q. Did some one help him into the house?

A. I think his wife was all.

Q. He walked into the house, didn't he?

A. Yes.

Q. In fact and don't you know, that he was out, even out riding, and out around town, after he came home?

A. No, sir, I do not know that.

Q. You don't know that?

A. No.

Q. What did you do for him there in the evening when you would stay until 12 or one o'clock? 115

A. For him?

Q. Yes.

A. Why I would assist my sister in caring for him.

Q. What did you do for him?

A. Well, there wasn't so much that I could do for him, I would hand him a drink of water when he would ask for it, or try to make him comfortable in any way that I could, or I would try to take care of the baby and let his wife do it. 116

Q. From Friday until the second Sunday you say you were there every night?

A. Yes, I was.

Q. Until late at night?

A. Yes, sir.

Q. And during the day time how much time did you spend there?

Mr. Davis: Objected to as repetition, she said she was there about two—three hours.

Court: She may answer. 117

A. I was there two—three hours during the day.

Q. Every day?

A. Yes, sir.

Q. Who else was there during that time?

A. I don't know, did you mean helping around?

Mr. Davis: No, he says who else was around there at the house observing the situation and conditions?

A. I couldn't say that.

Q. (Mr. Briggs) Who called upon him while
118 you were there?

A. I cannot recall.

Q. Did anybody?

A. Yes, I think he had callers.

Q. Well, did anybody call that you knew?

A. But as to my stating who called I cannot say.

Q. You knew their friends, didn't you?

A. Not all of them.

Q. You knew most of them?

119 A. I don't say that I did.

Q. A great many of them?

A. He knew lots of people that I never met.

Q. No, no, I mean a great many of their friends?

A. I don't know as that I did.

Q. Did anybody call during that period that you knew?

A. I cannot recall.

J. P. O'LEARY,

120 was called as a witness on behalf of the plaintiff and duly sworn.

DIRECT EXAMINATION.

By Mr. Davis:

Q. You remember testifying in a deposition last January in this case?

A. Yes, sir.

Q. You recollect testifying that you discovered this defective draw-bar at Budd, Iowa?

A. Yes, sir.

Q. And that the train went into emergency, and then after the train's going into emergency you went down and discovered the draw-bar pulled out? 121

A. Yes.

Q. Now then, when a train goes into emergency, what causes it to go into emergency?

A. The separating of the train, as in this case, would set the air in emergency.

Q. How far had the train separated when you got down there?

A. About 8 or 10 feet, maybe.

Q. In other words, when this draw-bar pulled out that would separate the train, cause the couplers to uncouple or come apart? 122

A. Yes, sir.

Q. Break the air-hose?

A. Yes, sir.

Q. And set the emergency?

A. Yes.

Q. And with this draw-bar pulled out as it was, the couplers couldn't operate, could they?

A. No, sir. 123

Q. And in order to do anything with them you would have to chain it up?

A. Yes.

CROSS-EXAMINATION.

By Mr. Briggs:

Q. Mr. Davis asked you when you first discovered this draw-bar was defective; how far had this draw-bar gone in that train before it broke?

A. I haven't got my book with me, but I think

I picked the car up in East Dubuque, that would
121 be about 15 miles.

Q. And the train had gone to Budd?

A. Yes, sir.

Q. What causes those breaks?

A. Well, a sudden jerk will often pull a draw-bar.

Q. Does a long train have anything to do with breaking draw-bars?

A. Well, they break with both long and short trains.

125 Q. I understand, but is there more breaking on long trains?

A. I wouldn't say that there would be more apt to break in a long train than a short train.

Q. Is there more of a jerk on a long train as they take up slack?

A. Yes, sir.

Q. You had stopped the train, you say, and switched to go on the passing track?

A. Yes, sir.

126 Q. At that time your train was intact, everything so far as you knew was all right?

A. Yes.

Q. And then when the train started up to go onto the passing track this break occurred?

A. Yes.

Q. In starting the train?

A. Yes, sir.

By Mr. Davis:

Q. You do know that draw-bars pull out because there are defects in draw-bars, too, don't you?

A. I have found them.

Q. You do know that sometimes they are improperly fastened and that causes them to pull out, don't you? 127

Mr. Briggs: Objected to as not proper re-direct examination or proper examination of his own witness,—cross-examination.

Mr. Davis: Question withdrawn.

Q. Mr. O'Leary, a suggestion was made to you by counsel as to what causes draw-bars to pull out, whether a sudden jerk of the train; now I am going to ask, on this day in question there wasn't anything out of the ordinary in the operation of the train, was there? 128

A. No, sir.

Q. No negligent handling of the engine or train by the engineer that you know of, at the time the draw-bar pulled out?

A. Well, the engine slipped when he started.

Q. Where were you?

A. Back in the caboose.

Q. How long was the train? 129

A. I would say between 40 and 45 cars.

Q. Could you tell back in the caboose that the engine slipped, or is it what somebody told you?

A. I could tell.

Q. You could tell away back there?

A. Yes, sir.

Q. Now, then, did the air go into emergency then?

A. No.

Q. I see; the engine started and then you got out of the caboose; did you start up alone to the engine, or what?

A. What was that?

130 Q. Where were you when you heard the train go into emergency?

A. I was in the caboose.

Q. In the caboose when you heard it?

A. Yes.

Q. How far was this car with the defective draw-bar from the caboose?

A. I think it was the fourth car.

Q. From the caboose?

A. Yes, sir.

131 OTTILIE RING,

was called as a witness on behalf of plaintiff and duly sworn.

DIRECT EXAMINATION.

By Mr. Davis:

Q. Your name is Ottilie Ring?

A. Yes, sir.

Q. You are the wife of Edmund Ludwig Ring, who was killed by the Great Western?

132 A. Yes, sir.

Q. Mrs. Ring, when did you first learn that he was hurt?

A. On Thursday morning.

Q. Was that by phone or how?

A. His cousin told us.

Q. You were married to him, were you?

A. Yes.

Q. When were you married to him?

A. Right after he came back from France in 1919.

Q. What time in 1919?

A. In February. 133

Q. Now, Mrs. Ring, at the time of his injury and prior to that time, do you know what the general condition of his health was?

A. It was good.

Q. How tall a man was he?

A. About five foot eleven.

Q. About how much did he weigh?

A. About 170 pounds.

Q. I hand you Exhibits A and B and ask you if that is a photograph of your husband, that substantially shows his height and general appear- 134
ance?

A. Yes.

Mr. Davis: We offer in evidence Exhibits A and B.

Mr. Briggs: Objected to as incompetent, irrelevant and immaterial.

Q. How long before he died were those photographs taken, do you know about how long?

A. Why, the one with the baby, that was taken 135
about three months before he died, and the other one was taken when he came back from France.

Mr. Davis: We withdraw Exhibit A then, that is the first one.

Mr. Briggs: Same objection, and no sufficient foundation laid.

Court: Exhibit B may be admitted.

Q. I will ask you to look at Exhibit B and state whether or not as he appears there in this photograph, which was taken about three months before he died, whether that at the time of his

death he was substantially the same—looked of
136 the same appearance?

A. Yes, he did.

Q. Prior to his death had he been in good health?

A. He had.

Q. Now, Mrs. Ring, how old a man was he?

A. He was 28 years old.

Q. How long had he worked continuously for the Great Western?

A. Well, altogether I think he has worked for
137 them about 8-9 years.

Q. Part of the time he was away from Oelwein?

A. Yes.

Q. And in the army?

A. Yes.

Q. And then when he came back did he start up to work for the Great Western?

A. For a short time.

Q. Did he continue to work for them?

A. No, they didn't want to give him back his
138 work, so he had to find other work.

Q. And then starting in April, 1920, two years and a half before his death, did he work right along then for them?

A. Yes.

Q. What was his work?

A. He was a brakeman.

Q. Freight or passenger?

A. Freight.

Q. And do you know whether or not on his run he was away from home a part of the time?

A. Yes.

Q. About how much of the time would he be 139
away from home?

A. Oh, about half the time.

Q. During the time that he was away from home do you know where he slept, when he was away from home?

A. He slept in the caboose.

Mr. Briggs: I move to strike out the answer as not responsive.

Mr. Davis: We consent.

Court: It is not responsive. 140

Q. With regard to his meals,—did he ever tell you that he slept in the caboose?

A. Yes.

Mr. Briggs: I move to strike it out as an improper question, and object to the question on the ground that it is incompetent, irrelevant, immaterial, and improper to ask such a question, knowing that the witness does not know except by hearsay.

Court: Objection sustained. 141

Mr. Briggs: I wish to take exception to the asking of the question.

Q. Mrs. Ring, with regard to his meals when he was away from home, will you state to the jury if you did anything with regard to getting any meals for him to take along with him?

A. Why, I packed his lunch a part of the time, and the other part of the time he cooked in the caboose.

Q. He cooked in the caboose?

Mr. Briggs: I move to strike out the question
142 (answer) as necessarily hearsay and not responsive to the question, that he cooked in the caboose.

Mr. Davis: We consent to that.

Court: It may be stricken.

Q. Now, Mrs. Ring, during the time that he was working for the Great Western did you live in Oelwein?

A. Yes.

Q. You were married, you say, in 1919?

A. Yes, sir.

143 Q. And after your marriage was there a baby born?

A. Yes.

Q. Came to your home,—when was that baby born?

A. March 18, 1921.

Q. During the time of your married life, while you were living with him, do you know what his general habits were as to being a man that was saving and thrifty?

144 A. He was saving and his habits were good.

Q. During the time that you lived with him and at the time of his death, did you own a home or did you rent?

A. We rented a home.

Q. About how much a month did you pay for rent?

A. $20.

Q. During that time you may state whether or not your husband was the sole means of support and maintenance of yourself and baby?

A. He was.

Q. Was he the sole source of contribution to yourself and baby—for your home and your clothing and everything you got? 145

A. He was.

Q. Now, Mrs. Ring, during that time, did he contribute to you for groceries, meat, coal, gasoline, electricity, telephone, fruit, vegetables, butter and eggs?

A. Yes.

Q. Can you state to the jury approximately how much a month he contributed for that purpose? 146

A. About from $160 to $175.

Q. No, for just the household?

A. About $100.

Q. Now, then, did he contribute to you for your clothes, clothes for the baby, shoes, and wearing apparel, and did he also contribute for nurse's hire and doctor bill when the baby came?

A. Yes.

Q. About how much on the average, including the cost of the baby, clothes for yourself and the baby, would you say, for the past two years before his death, or two years and a half, did he contribute, about how much a month for that purpose? 147

A. About $15-20 a month.

Q. Now, then, did he give you any money for any purpose such as church work or anything else?

A. Yes.

Q. About how much did he give you and contribute to you for church work?

A. About $30 a year.

Q. Did you contribute this as a member of any
148 church for helping the church?

A. Yes.

Q. Was he a man who attended church with you?

A. Yes.

Q. Was he a man of good or bad habits?

A. Good habits.

Q. A man who smoked?

A. No.

Q. Or who drank, as far as you know?

149 A. No.

Q. What church did you attend?

A. Lutheran.

Q. Mrs. Ring, did he contribute anything for the baby at this time, for milk and such things?

A. Yes.

Q. Was it necessary to have any extra amount of milk for the baby?

A. Yes, I had to have extra milk.

Q. About how many extra quarts of milk would
150 you use a day for the baby?

A. About two quarts.

Q. What did that cost a quart?

A. About 12 cents.

Q. About how much on the average would the milk and cream bill be?

A. About $8 a month.

Q. During the time that he was working there I presume some months he would earn more than others?

A. Yes.

Q. And some months he would earn less because he would work less? 151

A. Yes.

Q. And when he was earning big wages you may state to the jury whether or not you saved or he gave you any money to save for your use and for the carrying on of the house, or not?

A. Yes, he did.

Q. Now, tell the jury approximately how much a month he would save out of his wages for different purposes, for the purpose of using it for yourself or for taking care of the house and yourself 152 and baby?

A. About $30 or $40 a month.

Q. Some months I presume he wouldn't be able to save that?

A. No, he would not.

Q. When the months would come where there was less wages would that money be used in taking care of the things that you would have to pay?

A. Yes.

Q. During that time from April, 1920, to June, 153 1926, did he contribute to the purchase of any furniture for the home?

A. Yes.

Q. You may state to the jury whether or not at that time he received back pay?

A. He did.

Q. How much?

A. About $1,200 or $1,300.

Q. And that money was contributed to the household expenses?

A. Yes.

154 Q. To the buying of furniture and such things as that?

A. Yes.

Q. And then I believe about a year later, 1921, the baby came?

A. Yes.

Q. Was there any extra expense in connection with that?

A. There was.

Q. Who contributed to and bore the expense of

155 the coming of the baby and taking care of it and nurse hire?

A. My husband.

Q. How much on the average did he contribute for the support, maintenance and care of yourself and baby per month?

A. All the way from $160 to $175 a month.

Q. Sometimes it would be more and sometimes less?

A. Yes.

156 Q. Now, then, Mrs. Ring, in addition to that did you have any money which you would use in pleasure or amusement of any kind?

A. Yes.

Q. Well, in what way, would you attend picture shows?

A. Well, we would go to a show once in a while, and once in a while when it was real warm he would hire a car and take the baby and I for a ride.

Q. You didn't own a car?

A. No, we couldn't afford it.

Q. During that time when you would have this little pleasure, would he contribute and supply money for that? 157

A. He would.

Q. Now, then, Mrs. Ring, during the time you lived with Mr. Ring and he was alive, what kind of a man was he as to staying home when he was there?

A. He always stayed home.

Q. What kind of a husband was he as to his actions and conduct in the home?

Mr. Briggs: Do you understand that that is the measure of damages in this case? 158

Mr. Davis: Only showing the nature of the man as to whether he was thrifty.

Mr. Briggs: Would that indicate thrift?

Mr. Davis: Yes, it would.

Mr. Briggs: That is the purpose of showing it, is it, to show thrift?

Mr. Davis: Yes, sir, and showing the general character of the man. Is there any objection to the question? 159

(Question read to the witness.)

A. It was good, it was very good.

Q. During the time that he was at home you may state whether or not he assisted you in taking care of the baby?

A. He did.

Q. Now, Mrs. Ring, you learned that he was injured on Thursday?

A. Yes.

Q. And that would be the 5th of October?

A. He was injured the night of the 4th, but I
160 didn't learn of the accident until on Thursday morning.

Q. That would be the 5th?

A. Yes.

Q. When you learned of that where were you?

A. At my home.

Q. At your home in Oelwein?

A. At my home in Oelwein.

Q. And Mrs. Ring, did you learn where he was?

A. He was in Dubuque in a hospital.

161 Q. And that was on a Thursday you learned that?

A. Yes.

Q. Did you phone Dubuque?

A. I did.

Q. Whom did you talk to there?

A. A nurse at the hospital.

Q. And did you inquire about his condition there?

A. I did.

162 Q. And the next day did he come to Oelwein?

A. Yes, he did.

Q. About what time did he arrive?

A. About a quarter of five.

Q. On a Friday?

A. Yes.

Q. Did you meet him at the train?

A. I did.

Q. When you met him at the train you may tell the jury whether there was any difference in his appearance then and at the time he left home—to go to work?

A. Yes, sir, there was, he was walking very slow and he was very stooped when he came home. 163

Q. How did he go from the train to his home?

A. In a taxi.

Q. And when he got home did you notice any change or anything about his condition that was out of the ordinary?

A. Yes, I did.

Q. Tell the jury what you noticed about your husband?

A. Why, when he came home he was tired, and he was in pain, he asked me to help him take his 164 clothes off and get him to bed.

Q. When you got him to bed did you notice anything about him, anything unusual?

A. Yes, he tossed himself in bed, and groaned when he came home and complained of having pain across his stomach.

Q. Did he place his hands on any part of his body?

A. Yes, he placed his hands on his stomach.

Q. In front? 165

A. Yes.

Q. Did you notice whether there were any bandages around him?

A. He had a piece of tape strapped across him.

Q. Describe that tape to the jury, how it extended over his body?

A. It was about five inches wide, it was placed about his side about half way.

Q. In front?

A. In about here (indicating).

Q. On one side?

A. Just on one side.

166 Q. Do you remember on what side it was?

A. I rather think it was the right side, if I am not mistaken.

Q. And that bandage was there when he got home from the hospital?

A. Yes.

Q. On that Friday, Mrs. Ring, did he stay in bed all the time, or did he get up a part of the time?

A. Well, as he came on Friday night, he was in bed Friday, you see.

167 Q. That Friday night with regard to his sleep and how he rested, did he sleep any?

A. No, he didn't.

Q. What was his condition, just tell the jury so they can arrive at his condition?

A. Well, he was in misery, he just couldn't sleep, he would toss on the bed and he would groan, and he tumbled, and he couldn't rest.

Q. What did you do, if anything, to try to relieve his pain?

168 A. Well, I would try and do everything I could, I would get hot water bottles and things like that, but it didn't help.

Q. Mrs. Ring, that night did you stay up most of the night?

A. Yes.

Q. The next day would be Saturday I believe?

A. Yes.

Q. With regard to his condition Saturday how was he, what was his condition then?

A. Well, he wasn't much better, and he was in

bed the biggest share of that day, he was up very little at a time.

169

Q. Did he get up a part of the time?

A. Very little.

Q. And Saturday night were you with him then?

A. Yes.

Q. With regard to his condition on Saturday night, I wish you would tell the jury how he slept and what he did?

A. Why, he didn't sleep, he couldn't sleep, he was in pain and misery.

170

Q. And did you stay up with him?

Mr. Briggs: I move to strike out that he was in pain and misery as not responsive.

Mr. Davis: We consent.

Q. Did you stay up with him that night?

A. Why, I didn't stay up the fore part of the night because my sister stayed with him so I could get some rest.

Q. The later part of the night?

A. Yes, I was up with him after midnight.

171

Q. What, if anything, did you do for him that night?

A. Well, I gave him hot water bottles and things like that.

Q. Describe his actions, as to whether he would lay quietly in bed, or what he did?

A. No, he didn't, he would toss and he would roll and at times he would moan, and he couldn't lay still.

Q. Would he call for attention or help frequently?

A. Yes.

172 Q. During that night would he make any exclamations of pain?

A. Yes.

Q. Did he say anything to you as to where that pain was?

A. Yes.

Q. Where was it?

A. It was across his stomach.

Q. Did he place his hand on his stomach?

A. Yes, he had his hand on his stomach.

173 Q. Now Mrs. Ring, the next day was Sunday, and on that Sunday was he up a part of the day?

A. Yes, he was.

Q. You may state to the jury whether some of his railroad friends came and called on him?

A. Yes, he had quite a few of his friends that called on him on Sunday.

Q. Was he a man of cheerful disposition as a rule?

A. Yes, he was.

174 Q. And during the time on that Sunday did different railroad friends of his call to see him?

A. Yes.

Q. Do you recollect whether he went out that Sunday at all?

A. No, he didn't.

Q. Did he visit with them?

A. Yes.

Q. About how long would you say in all that they were there, those railroad men?

A. Well, they wouldn't stay longer than about half an hour.

Q. During the time that they were there did he try to be cheerful with them? 175

A. Yes.

Q. Now, then, Mrs. Ring, that night being Sunday night, how did he sleep that night?

A. He didn't sleep very much Sunday night, it was very little if any.

Q. Did you stay up with him that night?

A. A part of the night I did.

Q. What was his condition as to getting any better or worse as to tossing about, groaning and moaning? 176

A. That was no better.

Q. Did he toss about the same as the night before?

A. Yes.

Q. Monday morning arrived, and do you know if he went out for a ride on Monday?

A. Yes, he was.

Q. Who with?

A. His cousin.

Q. What is his name? 177

A. Quist.

Q. And he was a man that worked for the Great Western?

A. Yes.

Q. And is still working for them?

A. Yes.

Q. Do you know about how long he was out riding?

A. I don't think they were gone longer than half an hour.

Q. When he returned did he come into the house?

A. Yes.

178 Q. On that Monday night did you stay up with him?

A. Well, after supper time he told me he was going to bed, he didn't feel good, and he complained of having pains, and I helped him undress and he went to bed.

Q. Where did he complain of these pains?

A. Across his stomach.

Q. And did the pain that he complained of seem to be slight or intense?

179 A. Intense.

Q. You may state whether his face would be drawn or not?

A. It was.

Q. Mrs. Ring, during the night, Monday night, did anything out of the ordinary occur in regard to his condition?

A. Yes, about nine o'clock he started to vomit.

Q. What did he vomit?

A. Bile and blood.

180 Q. And about how much did he vomit the first time he vomited?

A. Well, I would judge about half a cupful to a cupful at a time.

Q. Now, Mrs. Ring, the next morning you may state whether or not you called a doctor?

A. I called a doctor Tuesday.

Q. What doctor did you call?

A. I called Dr. Wassem.

Q. You may state whether or not you informed him of his having vomited blood?

A. I did, I told him.

Q. And that was on Tuesday?

A. That was on Tuesday. 181

Q. On that Tuesday did his condition grow better or worse?

A. It got worse.

Q. Did he get up at all on Tuesday?

A. No, he didn't.

Q. He remained in bed all day?

A. Yes.

Q. Tuesday night arrived, what was his condition then?

A. His condition was very bad. 182

Q. What did he do?

A. Well, he would vomit, and he would lie in bed and he would ask me if I couldn't do something to relieve his pain.

Q. Wesdnesday arrived, did the doctor call again that day?

A. Wednesday I called Dr. Ward, the company doctor.

Q. Now, then, on Wednesday night did he sleep any at all that you know of? 183

A. No, not that I know of.

Q. Were you up most of the night with him?

A. I was.

Q. Thursday arrived, what was his condition then as to vomiting blood?

A. Well, Thursday his condition was worse, and the doctor came to the house daily.

Q. Dr. Ward?

A. Dr. Wassem.

Q. Thursday night did you stay up with him?

A. Yes, a part of the night I did.

Q. Friday arriving was he still in bed?

184 A. Yes.

Q. On Friday night what was his condition?

A. Well, he was getting worse then.

Q. In what way can you tell the jury that he was getting worse?

A. Well, he couldn't eat a thing, he couldn't keep a drink of any kind or anything on his stomach, he would have to vomit it all up, and when he would vomit he would lay on the edge of the bed so he couldn't put himself back on the pil-

185 low unless I would lift him.

Q. Would he try to eat anything?

A. He couldn't eat anything. He would eat a little broth or drink a little milk, but he couldn't keep anything on his stomach.

Q. Would he vomit it up?

A. Yes.

Q. Saturday arrived, what was his condition, growing worse or better?

A. At that time—he told me that day he had

186 to die.

Q. That was on Saturday?

A. Yes.

Q. During all that time was he conscious?

A. Yes.

Q. And did he talk to you about different things?

A. Not much.

Q. Did he talk to you about the baby?

A. Yes.

Q. About the home?

A. Yes.

Q. Now, Mrs. Ring, on Sunday where did you take him? 187

A. To Dubuque.

Q. On Sunday you took him to Dubuque?

A. To the hospital.

Q. And that was on a Sunday you took him to the hospital again, to turn him over to Dr. Pond, the company doctor?

A. Yes.

Q. Was that on Sunday?

A. Yes. 188

Q. Did you stay with him during the night?

A. I stayed a little while with him in the evening.

Q. And then Monday morning did you see him?

A. I did.

Q. With regard to his condition Sunday night, do you know whether or not he was suffering pain?

A. He was.

Q. Tell the jury whether or not anything was done for him there by the hospital attendants or 189 doctor?

A. I know they gave him hypodermics and things like that.

Q. Were you present at the time?

A. I was.

Mr. Briggs: I move to strike that answer out as incompetent, irrelevant and immaterial, when she says hypodermics, which means nothing, because there might be one thing or another thing, the inference that is evidently intended to be conveyed is to be given for pain.

Mr. Davis: We consent that the answer be
190 stricken out.

Q. Now, Mrs. Ring, on that Monday night, or Tuesday, were you there Tuesday a part of the time?

A. I was, until Tuesday noon.

Q. Then where did you go, Mrs. Ring?

A. Why, I went home.

Q. You went home?

A. Yes.

Q. At Oelwein?

191 A. Yes.

Q. Was your baby at Oelwein?

A. He was, and that is why my husband told me I should go home and take care of my baby.

Q. You went home on Tuesday?

A. Yes.

Q. On Wednesday you may tell the jury whether or not you phoned to Dubuque to the hospital?

A. I phoned to Dr. Pond daily while I was there.

192 Q. On Thursday did you phone Dr. Pond?

A. Yes.

Q. Did Dr. Pond call you on Thursday or Friday?

A. On Friday night.

Q. On Friday night?

A. Yes.

Q. About what time?

A. About 9:30.

Q. What did he say to you?

A. He told me my husband was very bad.

Q. And what did you do?

A. I went to Dubuque.

Q. Where did you go? 193

A. To the hospital. (Witness crying.)

Mr. Briggs: I think it is objectionable as not being material or relevant as to what was said or done, on the question of pain and suffering.

No ruling.

Q. Did you arrive at Dubuque?

A. I did.

Mr. Briggs: I object to the question as incompetent, irrelevant and immaterial.

Court: She may answer that. 194

Q. Did you arrive at Dubuque?

A. I did.

Q. When you arrived there did you go to the hospital?

A. I did.

Q. When you got to the hospital was your husband living or dead?

A. The nurse met me at the door—"your husband is dead." (Witness crying.)

Mr. Briggs: That is just exactly what I antici- 195
pated, that it hadn't anything to do with the pain or suffering of this decedent, and I object to that as immaterial and irrelevant.

Mr. Davis: It is evidence of his death.

Mr. Briggs: All that extra hadn't anything to do with pain or suffering,—and his death is admitted.

No ruling.

CROSS-EXAMINATION.

196 By Mr. Briggs:

Q. Mrs. Ring, you say that about Friday, Thursday, he came home?

A. He came home on Friday.

Q. Injured Wednesday night and came home on Friday?

A. Yes.

Mr. Davis: In view of counsel's statement, counsel said that it was admitted that he was dead,
197 I will call the court's attention that the answer denies every part of it.

Mr. Briggs: I have admitted it in court to the jury, and I have admitted it time and again since this case was started; there is no question about this man's death.

Mr. Briggs:

Q. Now, Mrs. Ring, your husband went out only once during the time?

A. That is all.

198 Q. That was the time he went out with Mr. Quist?

A. Yes.

Q. He went out riding?

A. Yes.

Q. You have said that he didn't sleep all these nights; you don't exactly mean that do you?

A. Why, if he slept he would sleep very little.

Q. He must have slept some, didn't he?

A. Very little, he wouldn't sleep more than 15 minutes at a time.

Q. Did he sleep during the day time?

A. No.

Q. Scarcely any during the ten days that he was home?

A. Not very much.

Q. And from Friday until the time you called Dr. Waseem the first time, when was that?

A. Until Tuesday.

Q. From Friday until Tuesday he was so bad that he had to have some one sitting up with him all night?

A. Well, I wouldn't sit up with him all night, I didn't say that, but I couldn't sleep because he tossed in bed, I couldn't sleep, either.

Q. You went to bed, then, each night during that period?

A. Yes.

Q. And he was restless?

A. Yes.

Q. And did you sleep?

A. No, I didn't.

Q. Not at all?

A. No.

Q. Not at all during any of those nights?

A. The only time I would sleep was when my sister would come over and stay with him and I would lay down and get some rest.

Q. But you did go to bed during those nights?

A. Yes.

Q. And it wasn't necessary for some one to stay up with him all the time?

A. Not all the time, I couldn't do much for him.

Q. But what you said gave the impression that

he didn't sleep at all, that was wrong wasn't it,—
202 you wish to have us understand that he didn't sleep at all?

A. He did sleep very little.

Q. "Very little" is rather indefinite; what I would like to get at is about how much he did sleep, what do you mean by very little? About how many hours a night would he sleep?

A. He wouldn't sleep an hour during the night.

Q. He wouldn't sleep an hour during the night any of those nights?

203 A. No, he didn't.

Q. Not an hour a night any night that he was home?

A. No, he didn't.

Q. You were awake so as to know how much he did sleep?

A. I was.

Q. His principal trouble seemed to be that he couldn't eat and retain anything, but would vomit?

A. Yes, and it was hard for him to breathe.

204 Q. It was hard for him to breathe?

A. Yes.

Q. Those two things, that he would vomit when he ate, and it bothered him to breathe?

A. Yes.

Q. You went back to Dubuque with him that Sunday afternoon?

A. I did.

Q. And you stayed until Tuesday and then returned home?

A. Yes.

Q. And he stayed at the hospital alone?

A. No, his mother was with him. His mother 205
went down there on Tuesday afternoon and she stayed until he died.

Q. She was there all the time?

A. Yes, she was.

Q. Is his mother here?

A. No, she is not, she isn't able to come or else she would have been here.

Q. Is Dr. Wassem here?

A. No, he isn't.

Q. Or Dr. Ward? 206

A. No.

Q. You live in Oelwein?

A. I do.

Q. Dr. Ward and Dr. Wassem live in Oelwein?

A. Yes.

Q. Where does his mother live, Mrs. Ring?

A. At that time, Stellman Valley, Illinois.

Q. You say he contributed about $160 to $175 a month to your support?

A. Yes. 207

Q. He was working for the Great Western during what period the last time?

A. From April '920 up until the time he died.

Q. That would be about two years and a half?

A. Yes.

Q. Do you know how he got his pay, whether it was paid semi-monthly or monthly, do you know how he got his pay, whether it was semi-monthly or monthly?

A. Why he would have pay day twice a month, every two weeks.

Q. Do you know how he was paid, by check or
208 otherwise?

A. By check.

Q. Did you see those checks?

A. He turned them over to me.

Q. He turned them over to you?

A. Yes.

Q. What did you do with them?

A. Well, I paid my bills and what money I had left I put in the bank.

Q. What bank did you deposit it in?

209 A. At the Oelwein bank.

Q. What is the name?

A. The State Bank of Oelwein.

Q. During those last two years and a half he didn't earn any money except what he received from the Great Western, did he?

A. No, he didn't.

(Twenty-five checks marked defendant's exhibits 1 to 25 and shown witness). Q. I call your attention to exhibits 1 to 25 inclusive, and ask you
210 if those are the semi-monthly checks that were received by Mr. Ring for his salary from the Chicago & Great Western Railroad during the last year before his death?

Q. This begins with his October pay, 1921, for the second period of October, tell us whether those are the checks?

A. Yes.

Q. Are those the checks that were received?

A. Yes.

Q. And will you look and see if that is his signature on the back of each of those checks?

A. This one isn't.

Q. Whose is that? 211

A. Mine.

Q. Your signature?

A. Yes.

Q. Keep those separate. Then what is your answer?

A. Not all of them.

Q. How many of them?

A. I think there is five of them that are mine.

Q. Five that you signed his name on?

A. I think so. 212

Q. But the money was drawn by you on those checks that you endorsed?

A. Yes.

Q. All the rest were signed by him?

A. Yes.

Q. Do I understand that you deposited all these checks in the bank?

A. Yes, I would say the biggest share of them.

Q. Not all of them?

A. Well I can't say that I did all of them. 213 There was times when he was home when it was pay day, when he would go down town that I couldn't go with him.

Q. But it all went itno the bank account?

A. Well, the money what we spent didn't.

Q. The money that you spent didn't go into the bank?

A. No.

Q. Do you mean that the money was gotten on these checks and you spent the money, and some of it you deposited?

A. Yes.

214 Q. You didn't deposit these checks in the bank but you cashed the checks and got the money?

A. Yes.

Q. But the checks themselves weren't deposited in the bank?

A. Yes, certainly, you would have to take the check to the bank and get the money.

Q. I guess you don't understand my question. What I mean by "depositing" is whether they were deposited to your name and you drew checks on

215 that?

A. Yes.

Q. And you didn't get the money when you took these checks to the bank, you didn't get the money for the check, you left them at the bank and drew checks on the account?

A. No, I got the money.

Q. What did you do with the money?

A. Well, I paid the bills.

Q. With the money?

216 A. Yes.

Q. How about the bank account that you or Mr. Ring started at the bank, did you have a bank account that you drew checks on yourself?

A. Yes.

Q. And that bank account was composed of moneys that were left over after paying the bills?

A. Yes.

Q. And then, going back to my other question, you don't wish to be understood that these were deposited in a bank account, but the money was obtained for these checks?

A. Yes.

Q. And then that money was partly spent and 217
partly deposited in the bank?

A. Yes.

Mr. Briggs: We offer in evidence Defendant's Exhibits 1 to 25 inclusive.

Mr. Davis: No objection. May I inquire if you have the year 1920 here?

Mr. Briggs: I have not.

Q. (Mr. Briggs) You spoke about some back pay?

A. Yes. 218

Q. About $12—1300?

A. Yes.

Q. And Mr. Ring began work for the Great Western the last time on March 19, 1921, or 1920?

A. I don't remember whether it was March or April.

Q. It was in the spring of 1920?

A. Yes.

Q. You are sure about the year?

A. Yes. 219

Q. He did work somewheres else for a time?

A. Yes.

Q. Where had he been working?

A. At Rockford.

Q. Rockford, Illinois?

A. Yes.

Q. You remember that he had been working for the Great Western before that time?

A. Yes.

Q. And when did he quit working for the Great Western before that time?

A. Well, I think Mr. Reinertz, I think he dis-
220 charged him in April.

Q. April of what year?

A. 1919.

Q. About a year before?

A. Yes.

Q. And he went to work then at Rockford?

A. Not right away he didn't.

Q. He was out of employment for a time?

A. Yes.

Q. And then he did earn some money during
221 that year?

A. Yes.

Q. And the railroad union to which he belonged took the matter up with the Government and complained that he was improperly discharged, and he was reinstated?

A. Yes.

Q. And this money that you say was back pay was pay that he was allowed for during the time that he was not working for the Great Western?

222 A. Yes.

Q. And then that wasn't money that was earned during any period that he was working for the company?

A. No, but he would have had it if he was working.

Q. I understand, but it was allowed him and paid him in that way?

A. Yes.

Q. And that is the reason he got this extra, back pay?

A. Yes, the $1200, what was over that he got as back pay when their wages was raised. 223

Q. But this $1200 didn't cover the period while he was working but it covered a period while he was not working?

A. Yes.

Q. To make the story short, it wouldn't allow him anything for being wrongfully discharged, as the Union contended, and the government ruled he was?

A. Yes.

Q. So that didn't include any part of his 224 monthly wage?

A. What was that?

Mr. Davis: Yes, it did.

Q. It didn't cover any part of his monthly wage during the time he got his regular pay? It didn't include any of his monthly wages during the time he got regular pay, when he was working?

A. No.

Q. But it covered a period when he was not working? 225

A. Yes.

Q. And that covered a period before March, or April, 1920?

A. Yes.

Q. And he died in the fall of 1922, October?

A. Yes.

Q. Two years and a half after he had resumed work for the Great Western?

A. Yes.

Q. Who were the callers the first Sunday he was home, do you remember?

A. Well, of course he had quite a few, it was
226 neighbors and railroad friends that called on him.

Q. Do you remember any of them?

A. Yes, I remember some of them.

Q. Who?

A. Mr. Taylor, and Nick Carter, and Mr. Paine and two of his brothers-in-law, and Mr. Bond.

Q. Are any of them here?

A. No

RE-DIRECT EXAMINATION.

227 By Mr. Davis:

Q. Mr. Taylor, who was he?

A. He is a man that works in the freight office.

Q. For what company?

A. The Great Western.

Q. Who is Mr. Paine?

A. He works for the Great Western also.

Q. They both called?

A. Yes.

228 Q. They are not here?

A. No.

Q. Now then, Mrs. Ring, with regard to the back pay which he received, you may state to the jury whether that back pay that was received, after it was received was contributed to your support and maintenance?

A. Well, at that time we was buying furniture, and we used some of that to buy furniture.

Q. I see that counsel has produced only the checks for one year, handing you this to refresh your recollection (paper shown witness) do you

know whether or not in the year 1920 and at other times he drew at times more than $200 a month? 229

A. Yes.

Q. I call your attention to the month of September, 1920, what did he draw?

A. $232.30, with back pay.

Q. In October, 1920?

A. $229.85, with back pay.

Q. November?

A. $192.28.

Q. December?

A. $211.01. 230

Q. In February, 1921?

A. $206.67, that is including back pay.

Q. But it isn't including the back pay that was paid in April?

A. No.

Q. Calling your attention to the back pay, those were small sums?

A. Those were small sums that he got, yes.

Q. Now, Mrs. Ring, during the time after he received this back pay, what was done with it, was 231 it all used at once, or was it used to pay the expenses and upkeep of the family?

A. Well, it was used to pay the expenses and upkeep of the family.

Q. When times would be slack of course he would earn less money?

A. Yes, he would earn less money.

Q. When times were good he would earn more money?

A. Yes.

Q. You used that money to make up the de-
232 ficiency and to keep up the home?

A. Yes.

RE-CROSS EXAMINATION.

By Mr. Briggs:

Q. These checks, Exhibits 1 to 25, cover all the moneys received during the last year prior to his death?

A. No, I don't think so. I think it was in the year 1921 when he received small amounts of back
233 pay.

Q. I mean for wages earned during the last year, these checks cover everything?

A. The 1200?

Q. No, these checks 1 to 25?

A. Yes, his earnings that he got, but you see he got back pay in between those times.

Q. Was that back pay that he had earned before?

A. No.

234 Q. You understand back pay to be compensation for the time when the Government was handling the business of the railroads, and the salaries of the men were changed from time to time, and before they had adjusted the appeals there would be a lapse of time, and when that time expired and a decision had been made, the Government, or the Railroad, would make up to the men whatever he may not have been paid during that period. That is what you understand as back pay?

A. Yes.

Q. So that the money that was received was

received for the wages earned during this War period, is that right?

235

A. Yes.

Q. And in those times, during the war period, the salaries were all a great deal higher than they were since, weren't they?

A. Yes, some of them.

Q. The men were getting tremendously big salaries, weren't they, during that period?

A. Yes, but he was in the army at that time.

Q. Well, I mean even from 1920, when he went back to work; after that the salaries continued for 236
a long time at those high rates, didn't they?

A. Oh, not so very high, no.

Q. You know that they were changed after that?

A. Yes.

Q. But these checks that we have here cover all the money that he earned during the year preceding his death?

A. I think those are for 1921, aren't they?

Q. 1921 and 1922. 237

Mr. Davis: October to October?

A. Yes.

Mr. Briggs: There are four days in October, 1922, that was paid in addition to one year in these checks, the checks cover from October 1st, 1921, to October 4, 1922, four days more than a year.

Mr. Davis:

Q. Mrs. Ring, calling your attention to check No. 10840, dated September 30, of $103.53, is that a month's pay or half a month?

A. Two weeks' pay.

238 Q. That is what he received the last full half month he worked?

A. Yes.

Q. Calling your attention to the $28.27, being check No. 2469, that was his compensation for the last four days before his death?

A. Yes.

It is stipulated that the normal expectancy of a normal man aged 28 years is 36.73 years.

It is stipulated that the sum of $16.65 invested
239 safely at five per cent would produce annually for 36.73 years one dollar per year; that the sum of $14.61 safely invested at six per cent would produce one dollar per year for 36.73 years, and that $12.80 invested safely at seven per cent would produce one dollar per year for 36.73 years.

Mr. Davis: Plaintiff rests.

Recess.

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249 Mr. Briggs made opening statement to the jury on behalf of the defendant.

Mr. Davis: We object to counsel's stating that he isn't objecting to the case being tried here, as entirely improper.

Mr. Briggs: You have emphasized that question, I didn't. We are required to try this case here because here is where the plaintiff has brought this case, not because we want it here, but because we have been brought here from this long distance, and we are not objecting to this case be-

ing tried here. We are asking you not to do anything but fair justice and to render a fair verdict 241
and decision as between these parties, not because it is brought here from Iowa, not because it is from any other place, but on the evidence that is introduced.

Mr. Davis: We object to that as not a proper part of an opening statement, and clearly an argument to the jury. I think it is apparent to the court that that is not proper and I ask counsel to desist. I think it is improper conduct on the part of counsel to attempt to argue this case. 242

Whereupon Mr. Briggs continued his opening statement.

J. P. O'LEARY,

was recalled as a witness on behalf of the defendant.

DIRECT EXAMINATION.

By Mr. Briggs:

Q. Mr. O'Leary, you have given your deposition 243
for the plaintiff in this case?

A. Yes, sir.

Q. And you have also testified on the stand for them?

A. Yes, sir.

Q. Now, there is only one or two other short questions I wish to ask you. Did this draw-bar that has been spoken of as pulling out, pull out in such a way that it became necessary to take the car to the repair-track for repairs?

A. Yes, sir.

244 Q. Where was the nearest repair-track?

A. At the Fair Grounds, at Dubuque.

Q. It could not be repaired at Budd?

A. No, sir.

Q. I believe you said in your deposition that you asked Mr. Ring to go up and notify the head brakeman, Quist?

A. Yes, sir.

Q. That you had this break in two, and to cut off the engine and run back on the other switch to

245 the rear end of the train?

A. Yes, sir.

Mr. Briggs: That's all.

Mr. Davis: That's all.

D. G. FLOWER,

was called as a witness on behalf of the defendant and duly sworn.

DIRECT EXAMINATION.

246 By Mr. Briggs:

Q. Mr. Flower, what is your occupation?

A. A locomotive engineer.

Q. On the Chicago & Great Western?

A. Yes, sir.

Q. Were you the engineer on the train at Budd on the evening of October 4, 1922, when Mr. Ring was injured?

A. I was.

Q. You remember how many cars you had in your train?

A. I would say about fifty, if I remember rightly.

247

Q. Do you remember stopping at the switch as you approached Budd?

A. Yes, sir.

Q. What was the movement that was made by the train at that time?

A. Well, heading in at Budd the air set, indicating the train had broke in two.

Q. You had stopped to open the switch, and started the train, and you had gotten a signal to go ahead?

248

A. Yes.

Q. But in starting the train what happened?

A. The air was set, indicating the train was broke in two.

Q. What did you do then?

A. I whistled a "broke-in-two" signal.

Q. That was to notify the train crew that the train had broken in two?

A. Yes, sir.

Q. Well, what was done next?

249

A. The head brakeman walked back on account of us being on a curve, to where he could get a signal from the rear end.

Q. That was Mr. Quist?

A. Mr. Quist, yes.

Q. Did you get any signal from any one afterwards?

A. In a few minutes I got a signal to back up.

Q. What was the grade and curvature of the track where your train was at that time after it got on the siding?

A. Well, there is quite a grade there, I don't
250 know the percentage, the per cent of the grade.

Q. Grade in which direction?

A. West.

Q. That is, as you went west you climbed a grade?

A. We climbed the grade, yes, sir.

Q. When you got the signal to back up what did you do?

A. We backed up until we received a stop-signal.

251 Q. And then what did you do?

A. In a few seconds I received a go-ahead signal, and we pulled in on the passing-track at the extreme west end.

Q. You pulled in on the passing-track at Budd?

A. At Budd.

Q. Where did you stop your train?

A. To clear the west end of the passing track.

Q. That is where your engine was?

A. Yes.

252 Q. You pulled up as far as the train would go?

A. Yes, sir.

Q. To clear your train at that point?

A. Well, I pulled up as close as I could get up to the switch with the engine, expecting to go right on out, as the other train had gone.

Q. You expected to get a signal to pull out at Budd as soon as the other train you were about to meet came in?

A. Yes, sir, the train was there.

Q. The train was there at Budd at the time?

A. At the time, yes, sir.

Q. And you expected to pull out in a short time? 253

A. Yes, sir.

Q. What was the next signal that you got?

A. Well, the head man had not come over yet, Mr. Quist, and I waited until he came over to throw the switch, and when he came over then he stated that they had a draw-bar out and we would have to bring the engine around to the rear end of the train.

Q. He said you had to bring the engine to the rear of the train? 254

A. Yes, sir.

Q. He gave that information to you?

A. Yes, sir.

Q. What did he then do?

A. Then he went behind the tank and cut the engine off from the train and gave me a signal to slack the train.

Q. He went behind the engine and cut the engine off the train?

A. Yes. 255

Q. So that you could run it onto the main line and get back to the rear of the train?

A. Yes, sir.

Q. Did he tell you that or give you a signal?

A. He gave me a signal.

Q. He gave you a signal that he was going to cut off the engine?

A. Yes, sir.

Q. Well, then, what was the next signal?

A. Stop-signal.

Q. A stop-signal for the engine?

256 A. For the engine, yes, sir.

Q. Where was your fireman during this time that you were talking and getting the signal,—talking with and getting the signals from Mr. Quist?

A. When Mr. Quist first come to the engine the fireman was in the tank shoveling down and breaking up coal, and then I told him, I says, Bill, he wants to cut the engine off and give a slack on the train. He came down on his lefthand side of

257 the engine and took the signal.

Q. He came down on the lefthand side and took the signal and passed it on to you?

A. Yes.

Q. And you were on the righthand side?

A. Yes.

Q. Quist was on the lefthand side when he gave these signals?

A. Yes, sir.

Q. And then what was the next thing that you

258 did?

A. I reversed the engine and gave slack on the pin.

Q. Did you see any movement of the train?

A. No, sir, I did not.

Q. And what did you get, what signal?

A. Stop-signal.

Q. Of the engine, you got that through the fireman?

A. Through the fireman.

Q. What was the next thing?

A. Well, then Mr. Quist came up and throwed the switch and signalled to come ahead, and went 259
to the switch, back to the rear of the train.

Q. He came up past your engine and went up to the switch and threw the switch and gave you a signal to come up?

A. Yes.

Q. And you went up past the switch and went over the switch so as to give you the line free?

A. Yes, sir.

Q. And then what signal did he give you?

A. He gave a back-up signal. 260

Q. And you went where?

A. To the rear of the train, the east track switch, and headed in the rear of the caboose.

Q. When was the first that you knew Ring had been injured?

A. The conductor, Mr. O'Leary, told me that time when we were behind the caboose.

Q. When you got your engine back behind the train?

A. Yes, sir. 261

Q. You saw no movement of the train?

A. I saw no movement of the train.

Q. After you learned that what was done with the caboose and with Mr. Ring?

A. I took the caboose to the west end of the passing-track and telephoned and got orders to return to Dubuque,—Mr. O'Leary got the orders and gave them to me, and we went to Dubuque immediately.

Q. You took the caboose with Mr. Ring in it?

A. Yes.

Q. And that was the evening of October 4,
262 1922?

A. Yes, I am not certain of the date.

Q. That was the night that he was injured?

A. That was the night he was injured, I am positive of that.

Q. Did you see Ring go to the caboose?

A. No, sir, I did not.

Q. Did you see him leave the caboose?

A. Yes, sir.

Q. At Dubuque?

263 A. At Dubuque.

Q. Have you told us all you know of this accident?

A. I have.

Q. How long had Ring been an employe of the Great Western that you know of?

A. Oh, I would judge six—seven years, I am not positive, quite a while.

Q. On this run between Oelwein and Stockton?

A. I think he was employed there most of his
264 time.

Q. Do you know whether he was familiar with the conditions at Budd?

A. Oh, he certainly must have been.

Q. Both the grade and curvature of the track?

A. I am certain he was.

Q. During all that time he was acting as brakeman?

A. Yes, sir.

Q. And he carried a rule-book of the company?

A. I suppose he did, we all did.

Q. You are obliged to do that, are you?

A. We are obliged to do that. 265

Q. Are you familiar with the rule relating to giving information to the engineer, or the man in control of the train and engine, when any one is going in between the cars?

A. I am. I am familiar with the rule, yes. Whether I can repeat the exact words I don't know.

Q. I call your attention to Chicago & Great Western Railroad Company's Book of Rules and ask you if that Rule 707 is the rule that has been 266 in effect on the Great Western for many years?

A. To the best of my knowledge I believe it has.

Q. You have been familiar with that rule?

A. Yes, sir.

Book of Rules marked Exhibit 26 on page 129.

Mr. Briggs: We wish to offer in evidence rule 707 of the Book of Rules of the Great Western, marked exhibit 26.

Mr. Davis: No objection.

Exhibit 26 was read to the jury as follows: 267

"707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."

Q. Did you get any information that either
268 Mr. Ring or Mr. O'Leary were between the cars?

A. No, sir.

Q. Did you have any knowledge at the time this uncoupling took place of your engine that anybody was between the cars?

A. No, sir.

CROSS-EXAMINATION.

By Mr. Davis:

Q. Mr. Flower, as I understand it, after you
269 uncoupled your engine and went down the track past the caboose you learned that Mr. Ring had been hurt?

A. Yes, sir.

Q. He had been hurt before you got down there?

A. Yes, sir.

Q. Was he outside from between the cars when you got down there?

A. I didn't see him.

270 Q. You didn't see him?

A. No, sir.

Q. Who conveyed the information to you that he had been injured?

A. Mr. O'Leary.

Q. Mr. O'Leary was the conductor in charge of that train?

A. Yes, sir.

Q. You know as a practical railroadman that it is the duty of a brakeman to take his instructions and orders from the conductor, don't you, the conductor is the one in charge of the men?

A. Mr. Quist was the first man that informed me that he had been—

271

Q. I say, Mr. O'Leary as conductor had charge of the brakemen?

A. I suppose he does have.

Q. Well, you know that, don't you, as a railroadman, you know that the conductor has the entire charge of that train in its movements, don't you?

A. I suppose he has.

Q. And the brakemen work under orders and directions from the conductor, do they not?

272

A. If it is not against the rules of safety.

Q. Do you mean to say that if a conductor sometimes against the rules of safety directed a brakeman to do a certain thing, that they don't do it?

A. They wouldn't have to.

Q. But they do do it, don't they, you know from practical railroad experience that they do do it?

A. No.

273

Q. Now, Mr. Flower, when you got down there, or when you learned that the train had broke in two, they came up to get a draw-bar, didn't they, up to the engine?

A. No, sir.

Q. Did you learn that a draw-bar was pulled out?

A. I didn't know what had happened.

Q. When this emergency was set, what did that indicate to you?

A. That the train would have broke in two.

91

Q. That it was due to a parting coupler or
274 break of the air-hose, wouldn't it?

A. Yes, sir.

Q. When did you first learn about the draw-bar, you said something about a draw-bar, that Quist was up there?

A. When Quist came over from the rear end he said we have to take the engine around and set out a bad-order car, or some such remark.

Q. He said something about a draw-bar, didn't he?

275 A. Yes, he said he had a draw-bar out.

Q. Did he tell you that they had to chain up a draw-bar?

A. He didn't say, he made no mention of a chain whatever.

Q. Did he mention the draw-bar, that a draw-bar had pulled out?

A. Yes, sir.

Q. You knew then that a draw-bar had pulled out when that train came to a stop, didn't you?

276 A. Yes, sir, I knew it was in a weakened condition.

Q. He said,—he told you the draw-bar had pulled out?

A. He says it was to set out a bar, to get a bar, he says, we have got a bar; that is the remark he made.

Q. Did he say draw-bar?

A. No, "we just got a bar."

Q. Did you understand him to mean draw-bar?

A. Yes, sir.

Q. You knew that there was something defective with that draw-bar that caused that train 277
to part, didn't you?

A. Yes, that was my impression.

Q. You knew that at the time he told you?

A. Yes.

Q. Your engine at the time he told you was attached to the cars?

A. Yes, sir.

Q. So the movement of the train, or your engine, occurred after you knew the draw-bar was defective and the train had parted, didn't it? 278

A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Briggs:

Q. A train might break in two in various ways, could it not?

A. Yes, sir.

Q. Without a draw-bar pulling out?

A. Yes, sir.

Mr. Briggs: We offer Rule No. 703 of the Chi- 279
cago Great Western Railroad Company's Book of Rules in evidence.

Received without objection.

Read into the record as follows:

"703. Persons accepting service will be deemed to have full knowledge of the dangers and risks incident to the service. They agree to exercise due care in the performance of their duties to prevent accident to themselves or others, and, before using them, to see that the machinery, tools, appliances

and materials are in a safe condition to perform
280 the service required."

"Employes are not required nor expected to pursue a dangerous practice in the performance of their duties, nor use defective appliances of any character."

Q. Both of those rules were in force at the time of this accident?

A. Yes, sir.

Q. Both that and 707 that I read before?

A. Yes, sir.

281 Q. Did you make any other movement with your engine except to give the slack for the pin?

A. No.

Q. How far would it be necessary for your engine to move to give the slack to the pin?

A. Oh, I would say a couple of inches.

Q. Just enough to loosen the pin that was bound because it was coupled up?

A. Yes.

W. A. JOHNSON,

282 was called as a witness on behalf of the defendant and duly sworn.

DIRECT EXAMINATION.

By Mr. Briggs:

Q. Mr. Johnson, what is your business?

A. Fireman on the Great Western.

Q. What was it on October 4, 1922?

A. Oh, I wouldn't swear what date it was.

Q. What were you doing on that date, what was your business on that date?

A. Fireman on the Great Western.

Q. Were you fireman on the train which Mr. 283
Flower was engineer of at the time Mr. Ring was injured?

A. Yes.

Q. What were you doing after you pulled in on the sidetrack?

A. After we pulled in and stopped?

Q. Well, while you were pulling in and when you stopped?

A. I was back in the tank putting down coal in the pit, and breaking it up. 284

Q. Back in the tank?

A. In the coal tank.

Q. In the coal tank?

A. Yes, sir, breaking up the coal and pulling it down.

Q. So that you would have it ready to fire in the engine?

A. Yes, sir.

Q. Were you firing the engine at all?

A. I had a stoker, the stoker was firing the 285
engine, that engine was a stoker-engine, you see, and we had only one more station to go until we got coal, and the coal was getting way back and I had to pull it out into the pit so that it would lift it up.

Q. When did you discontinue that?

A. When Mr. Flower said, "he wants to slack the pin."

Q. He wants to slack it?

A. Yes, the head brakeman, Mr. Quist.

Q. And then what did you do?

A. Well, I came right out of the tank to my
286 side, on the left side, and he was giving a signal to slack the pin, as he had given Mr. Flower, and Mr. Flower was over on his side, and he slackened the pin, gave him the slack.

Q. Quist was on which side of the train?

A. On the left side at that time.

Q. That is the side which you were on, is it?

A. Yes, sir.

Q. And Mr. Flower was on the right side?

A. Yes.

287 Q. And Mr. Flower was in a position where he couldn't take all the signals, he couldn't see them, is that right?

A. Yes, sir.

Q. You received them and passed them on to him?

A. Yes, sir.

Q. Did Mr. Flower give the slack?

A. Yes, sir.

Q. Was the engine cut off?

288 A. Yes, sir.

Q. And then what did you do?

A. Well, when Mr. Flower took the slack, he cut the engine off and then give a go-ahead, and I told him to go ahead, and he started ahead, and then he swung us down, and I says, that will do, so Mr. Flower stopped.

Q. Did you see Mr. Ring back there?

A. No, he stepped in out of sight—the hind brakeman.

Q. And did you see the train back or move then?

A. No, I didn't, I didn't see the train move, in fact it would have to move quite a little distance 289
for me to see it, it was dark.

Q. You did what next?

A. Well, then he come up and give us a signal to go ahead.

Q. Did you go up and throw the switch?

A. Yes, sir.

Q. You ran through the switch and you went onto the main track and backed, as you heard, according to Mr. Flower's testimony?

A. We went over the switch he throwed and 290
lined us up for the main line and we backed down the main line to the rear of the train.

Q. Did you at the time this slack was given to draw that pin, know that Mr. Ring was in between the cars?

A. No, sir.

Q. You didn't learn of the accident until after you got back to the rear of the train?

A. I didn't learn of the accident or even that we were broke in two until we got to the back of 291
the train.

Mr. Davis: No cross-examination.

FRANK QUIST,

292 was called as a witness on behalf of the defendant and duly sworn.

DIRECT EXAMINATION.

By Mr. Briggs:

Q. Mr. Quist, what is your business?

A. Brakeman.

Q. On what road?

A. Chicago Great Western.

293 Q. How long have you been brakeman on that road?

A. Three years next month.

Q. What were you doing on October 4, 1922?

A. Braking on the Great Western.

Q. Do you remember the night that Mr. Ring was injured?

A. Yes, sir.

Q. At Budd, Iowa?

A. Yes, sir.

294 Q. And do you remember the train breaking in two at Budd?

A. Yes, sir.

Q. Just tell where you were at the time it broke in two?

A. On the ground at the east switch.

Q. On the ground at the east switch at the head of the train?

A. Yes, sir.

Q. What had you done after the train stopped at Budd and before it broke in two?

A. Well, I was on the engine, when we stopped I got off the engine and walked to the head end 295
lining the switch, and he started to pull in, and then whistled a broke-in-two signal.

Q. The engineer whistled a break-in-two signal?

A. Yes, sir.

Q. And then what did you do?

A. Started back toward the rear.

Q. How far back did you go?

A. Oh, I should judge about half way.

Q. What happened then? 296

A. I could see the rear end men with their lanterns.

Q. Well, did you meet anybody back there at that time?

A. Meet anybody?

Q. Yes.

A. No, sir. Not at that time.

Q. And then what did you do after that?

A. He gave me a signal to back up.

Q. What was done? 297

A. Which I transferred to the engineer.

Q. And did he back up?

A. He backed up.

Q. And then what did you do?

A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

298 Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear? He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, I took it to mean that I should go in and go around with the engine.

Q. That expression?

A. That means that, to go around about my 299 business, to go up there and get into clear, and come back.

Q. Cut off the engine?

A. Yes, cut off the engine, and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir.

Q. What did you do as it was pulled in?

300 A. I was hanging on the side of a car when we were pulling them in.

Q. Riding it?

A. Yes, sir.

Q. When it stopped what did you do?

A. Walked up to cut off the engine.

Q. What did you do when you got there?

A. I stepped in between and turned the angle-cock preparing to cut the engine off.

Q. The angle-cock, you mean the air?

A. That is the air, yes, sir. I thought probably

I could get the pin without any slacking up, but I couldn't. 301

Q. Why?

A. Because the knuckles was tight.

Q. That is, it was stretched instead of together?

A. Yes, sir.

Q. And pulled against the pin and held the pin tight so that it wouldn't lift, is that right?

A. Yes, sir, that is right.

Q. And then what did you do?

A. I told him to give a signal that I wanted 302 slack, and the engineer he was standing in the gang-way.

Q. That is Mr. Flower, who just testified?

A. Yes, sir, "give me the slack and we will cut her off and we will go back to the rear end."

Q. You told him?

A. We have got a bad-order to set out.

Q. Did he give you the slack?

A. Yes, sir.

Q. What did you do? 303

A. The minute I got the slack I raised the pin.

Q. What occurred then?

A. And I gave him a signal to go ahead, he started ahead and the car started the other way.

Q. The train that you cut off started the other way?

A. I swung him down, I didn't pay no more attention to him, I walked back in between the engine and the cars and took hold of the angle-cock and turned it over gently and set the air and stopped the train from going out the other end.

Q. Did it set the air?

304 A. It did because they stopped.

Q. How far had the car that you cut off moved before it stopped?

A. Oh, five—six feet.

Q. No more?

A. Well, it might have been seven, I wouldn't—it is just an estimate.

Q. That is your best judgment?

A. Yes, sir, from five to seven.

Q. Did you know at that time that Ring was

305 between the cars or in the train?

A. No, sir, I had no way to know it.

Q. Had you received any signal or warning that he was there?

A. None whatsoever.

Q. And you were following out his instructions when you cut the engine off and came around?

A. Yes, sir.

Q. What did you do next?

A. I headed out onto the main line, and went

306 down the main line to the east end, and headed in on the caboose.

Q. What do you mean by "heading in on the caboose"?

A. Well, you see, coming down the main line we were backing, and coming to throw this switch here we headed in.

Q. The caboose was the last car on the track?

A. Yes, sir.

Q. When you got back there what did you learn relative to Ring?

A. Well, after I got the engine I walked back to where I saw the light was and I stepped in be- 307
tween the cars and he was on the other side lying down in the grass, and I asked him what happened, he said, "the chain caught me"; that was all that was said.

Q. Did you ask him whether it hurt him?

A. No, I didn't.

Q. And then what was done next, relative to taking him to the caboose, for instance?

A. Well, they came there and took the engine and the caboose and one of the cars, and set some 308
of them over on the main line, and he says you take care of this car, he said, get that chain off.

Q. He said that to you?

A. Yes, which I did, and he made the switch and came back, and Ring got up and walked aside of him and took hold of the grab-iron of the caboose and went in the caboose and laid down on a bunk.

Q. He got into the caboose himself?

A. Yes, sir. 309

Q. Did you and O'Leary go with him?

A. Yes, sir.

Q. And when he got to the caboose he got in alone, is that right?

A. Yes, sir.

Q. And then what was done next about going from there to Dubuque?

A. We went to the west end and the engineer called a dispatcher and got running orders to go back to Dubuque.

Q. Went to the west end?

310 A. Yes, sir.

Q. West end of what?

A. The passing track.

Q. Did you have telephone service there?

A. Yes, sir.

Q. And you got orders?

A. To go back to Dubuque.

Q. To go back to Dubuque with him?

A. Yes, sir.

Q. And did you do so?

311 A. Yes, sir.

Q. Did you ride in the caboose with him?

A. Yes, sir.

Q. What was his condition during the trip from Budd to Dubuque, and what was said and done?

A. There was nothing said or done. I asked him what I could do for him; he said, nothing, Frank, he says, there is nothing. That's all there was to it, he lay on one side a while and then he would roll on the other. I took down a cushion

312 and bed-clothes and made him as comfortable as I could.

Q. What was done when you arrived at Dubuque?

A. The doctor took charge of him there, and that is the last.

Q. Dr. Pond?

A. Yes, sir.

Q. When he got off the caboose at Dubuque who went with him?

A. Doc. Pond and another doctor walked with him over to Dr. Pond's car, and I walked behind

them, he got in the car and I asked him if he wanted me to go with him, he says no, you go on about your business. 313

Q. Did you see him again that night?

A. No, sir.

Q. When did you next see him?

A. On Monday.

Q. On Monday following?

A. Yes, sir.

Q. What occurred that Monday following?

A. I came in in the forenoon and I had dinner, and I went up there to see him. I asked him if 314 there was anything he wanted and he said, I would like to go down to the yard office. I says, all right, come on and get in the Ford and we will go.

Q. Your Ford?

A. Yes, sir. We drove to the yard office, walked over to the caboose track, but the caboose wasn't there.

Q. How far was that?

A. Well, about as far as once and a half across this room anyway. 315

Q. And then what?

A. We walked back and we walked in the yard office and looked at the board, bulletins, mail-box. I says, you want to go down and find the caboose? Yes. All right, we will go again. So we drove down to the passenger depot.

Q. How far is that?

A. Well, that must be six-seven blocks, anyway, from the yard office. And left the car there at the viaduct, and walked over.

Q. How far?

316 A. Well, it wasn't very far, we crossed probably four or five, maybe six tracks. I can't remember on just which track the caboose was.

Q. You found the caboose?

A. We found the caboose, and he waited outside, and I went in, I forget what it was he wanted, something he had in there that he wanted. I brought it out and I told him I would put it away, that I knew where it was. We went back to the car, I says, where do you want to go now, do you
317 want a paper or anything? Yes, he might have a Chicago paper, he says. I says, it don't hurt you to read, does it? No, not a bit, he says. So we drove up and got a Chicago paper, and from there home.

Q. That was on Monday?

A. Yes, sir.

Q. Did you see him afterwards?

A. I seen him a couple of times afterwards, but just a few minutes at a time, on my way to work.

318 Q. At his house?

A. Yes, sir.

Q. Did you talk with him about how he felt at any other time?

A. No, I wouldn't say I asked him exactly how he felt, only that one time. My wife used to call up on the telephone and she would tell me when I would come in.

Q. How long have you been, you said, working for the Great Western?

A. Three years next month.

Q. What run have you been on during that time?

319

A. Well, I guess I worked pretty near all of them.

Q. Did you run between Oelwein and Stockton a considerable time?

A. I have run between Oelwein and Stockton, and I have worked between Stockton and Chicago

Q. How long did you run between Oelwein and Stockton?

A. Well, probably all excepting about two months I think.

320

Q. That was your run excepting for a short period?

A. Yes.

Q. And did you and Ring use to work together?

A. We did for a short time, yes.

Q. Before the accident?

A. Yes, sir.

Q. You are a cousin of Ring's?

A. Yes, sir.

Q. Are you familiar with and do you know of Mr. Ring's habits with reference to living expenses while he was out on a run?

321

Mr. Davis: Answer by yes or no.

A. Yes.

Q. Did you and he live about the same during that time?

Mr. Davis: Objected to as calling for the conclusion of the witness and no foundation laid.

Mr. Briggs: We expect to show the way both of these men lived and what it cost.

No ruling heard.

Q. Mr. Quist, during the last year before his
322 death you were working on that run between Oelwein and Stockton?

A. Yes, sir.

Q. Was Mr. Ring working there during that period?

A. He was working there, yes.

Q. Did you observe the way he lived and how he incurred and paid his expenses, the same as you did and others whom he worked with?

A. Yes; during the time we didn't work to-
323 gether we would occasionally meet there, sometimes we were there several hours together, sometimes we just saw each other to speak; sometimes we would sit down and eat dinner or breakfast or supper together, whatever it might be; we were most always together when we were down there.

Q. Do you know what his general cost of living would be as Ring lived along during that period when he was out on the road, approximately, at least?

324 A. Yes.

Q. What in your opinion was the minimum cost of Mr. Ring for his expenses and living while he was out on the road in the service between Stockton and Oelwein, each month?

A. Well, to the best of my estimation it would be around $40. It would vary.

Q. Would it average $40?

A. I have never figured it so closely, I wouldn't assume to say; in my judgment it would be $40.

Q. What was the grade of the passing track

where this train stood where you cut off the engine?

325

A. Well, I couldn't say what the grade is.

Q. I don't mean the exact grade, but is it down or up?

A. Up.

Q. Up which direction?

A. West.

Q. That is, as you come from the caboose toward the engine you would go up there?

A. Yes, sir.

Q. Was that known to all the railroad men 326 that were operating there?

A. It couldn't help but be.

CROSS-EXAMINATION.

By Mr. Davis:

Q. You know the grade was up?

A. Yes.

Q. You knew when you cut the engine off the grade was up?

A. Yes. 327

Q. Did you know then that the grade was up to such an extent that when you cut off the engine unless you set the air on the cars all the cars would drift back, did you know that before you cut the engine off, Quist?

A. It isn't customary to set the air.

Q. Did you know that the grade was of such an extent that when you cut the engine off that unless you set the air on the cars the cars would start to drift back, did you know that?

A. No, sir.

328 Q. You say you didn't know it?

A. I know there is a grade there, yes.

Q. But did you know that the grade was of such an extent that when you cut the engine off unless you set the air on the cars the cars would drift back, did you know that that day?

A. Well, I will tell you, as soon as—

Q. Answer my question, please?

A. Yes, I am going to answer it.

Q. Answer it yes or no. It can be answered

329 yes or no.

A. That is a pretty hard question to answer yes.

Q. If you can, answer it by yes or no, and if you can't I wish you would tell the jury why you can't.

Q. (Question read to the witness.)

A. No, sir, I can't answer that question that way.

Q. You can't answer it either yes or no?

330 A. Not in that way, no, sir.

Q. You didn't set the air on those cars until after they started to drift, did you?

A. No, sir.

Q. Were you present when Mr. O'Leary gave his deposition in St. Paul last winter?

A. I was in St. Paul, yes.

Q. You were there at the time he gave his deposition, weren't you in the room?

A. I think I was.

Q. And you heard him testify that the car drifted back forty feet, didn't you?

A. Well, I tell you I didn't pay much attention to it, I was sitting back in one corner there. 331

Q. As I understand you, all they drifted back was five to seven feet and then you set the air, is that right?

A. That is what I did of my own act, yes, sir.

Q. And then the cars came to a stop, didn't they?

A. Yes.

Q. That air would hold it, then, on that grade?

A. Yes.

Q. And, Mr. Quist, did Ring work with you all 332 the time on the same run last year?

A. No, we just worked together for a short time.

Q. About how long?

A. And we worked together a short time in the spring. And then I was on the extra board for a while, practically all summer.

Q. How long in the spring did you work on the same run as Mr. Ring?

A. Well, I should judge probably a month and 333 a half, I wouldn't say so correctly; about that.

Q. Will you now swear that you worked over two weeks in the spring of 1922 on the same run as Ed. Ring?

A. Yes, sir.

Q. How much longer?

A. Well, that, as I say, I couldn't tell, because I went back to work then and we started in September, I believe it was.

Q. Did you work with him then?

A. Again, yes.

Q. Up to the time of his death?

334 A. Yes, sir.

Q. Now, then, Mr. Quist, did you know that Mr. Ring brought his meals with him packed by his wife, you knew that, didn't you?

A. Well, he carried lunch sometimes, not always.

Q. Well, as a rule he did, did he not?

A. I couldn't say to that because I very seldom was back there going over the road.

Q. When he got to the end of the line is it not

335 a fact that he slept in a caboose when he was down at the other end of the line?

A. Yes, sir.

Q. He didn't have any bills to pay for hotel room, did he?

A. No, sir.

Q. He didn't drink, did he?

A. No, sir.

Q. A man of good habits?

A. Yes, sir.

336 Q. He was a thrifty man, wasn't he, you knew that?

A. Yes, sir.

Q. A saving man, wasn't he, that is true, isn't it?

A. Yes, sir.

Q. A man who tried to save his money?

A. Yes, sir.

Q. A good, hard, honest worker, wasn't he?

A. He was an honest man.

Q. Now, Mr. Quist, when you told this counsel

and this jury that in your opinion he spent $40 a
month at that end of the line, it would have to be 337
for meals, wouldn't it, that's the only thing that
you ever saw him spend any money for, was for
something to eat, wasn't it?

A. Yes, sir.

Q. How many meals would you say you ate
with him during the time you worked with him?

A. Oh, I couldn't tell you that, how many we
ate together, that is impossible.

Q. Would you say you know what he paid for
his meals, do you know of any instance what he 338
paid for his meals?

A. Well, they have a price there, and for lunch
it is forty cents up.

Q. Forty cents, and he would have only one
meal on the run at that end?

A. There is only one meal a day that he got for
forty cents, and that is dinner.

Q. He would have that meal to eat, wouldn't
he?

A. Yes, that he was there. 339

Q. And sometimes he didn't eat there with you,
did he?

A. No, not if I wasn't there.

Q. But even when you were there sometimes he
would eat his lunch in the caboose, didn't he, his
dinner, isn't that true, Mr. Quist

A. Not while we broke together.

Q. Not at any time?

A. He always ate—when we were in Stockton
he ate in Stockton, and what he had in the ca-
boose between times that I don't know.

Q. When would you get into Stockton?

340 A. All hours of the night and all hours of the day.

Q. How many meals would you eat at Stockton?

A. Sometimes you may eat two, might be five, maybe six, it all depends on how long you were there.

Q. In an ordinary run?

A. That is very hard to tell. The first man in is the first man out.

341 Q. And a man coming at night would be out the next morning?

A. Provided that there was a train to go, or otherwise they would hold him.

Q. They who usually worked regularly?

A. That wouldn't make no difference.

Q. How long would he stay an over-night stop?

A. Anywhere from eight hours to 24.

Q. It might be eight he would stop there?

A. Yes.

342 Q. What meals would he eat if he had eight hours stop?

A. He would eat about two, probably three, depending on what time he would come in there.

Q. Eat three meals in eight hours?

A. Generally eat when we leave.

Q. Did he eat three meals when he stopped there eight hours?

A. You might not call it a full meal.

Q. He would get a sandwich?

A. Yes, or a piece of pie or a glass of milk.

Q. That would cost about how much?

A. Milk is five cents a glass, pie is five cents a 343
cut and ice cream is five cents a dish.

Q. Did you see him eat any ice cream in October?

A. I have seen him eat lots of it.

Q. At home or on the train?

A. At Stockton.

Q. Mr. Quist, when you say that his expenses would be $40 a month, that is your mere guess as to what you think he spent, isn't it?

A. That is my estimate. 344

Q. As a matter of fact you wouldn't want to swear that he spent at the time over $30 a month, you wouldn't tell this jury that, would you?

A. Well, it is as I say, it varies, one time you might get by with it and another time you wouldn't.

Q. Would you say, Mr. Quist, that you would now state to the jury that you know of your own knowledge that he spent at any time any money more than $30 at Stockton, what is your answer? 345

A. My answer is the same as I said before, I would place it at $40.

Q. But do you know of your own knowledge that he ever spent as much as $30 any month?

A. I never checked up on what he spent.

Q. You never checked up on what he spent and you are simply giving an estimate?

A. Yes, sir.

Q. It may be $30 and it may be $40?

A. Yes, and it may be more, I never checked my own expenses, that is the point I make.

Q. You have never checked your own?

346 A. No, sir.

Q. So you don't know what your expenses was?

A. Not so correctly.

Q. It might have been less than $30 and it might be more?

A. No, sir, not less.

Q. You are sure now—let me ask you this, will you state now under oath that you know from your own knowledge that Mr. Ring ever spent more than $30 on the run?

347 A. No, I won't state any because I can't.

Q. You didn't pay any particular attention to what he spent, did you?

A. I never, that wasn't my business.

Q. And you never paid enough particular attention to what you paid yourself to be a bit definite as to what you spent, have you?

A. Not right down to the rock-bottom dollar, no.

Q. Now, Mr. Quist, isn't it a fact that you were

348 present when Mr. O'Leary gave his deposition at St. Paul when he stated that you and Mr. O'Leary helped Mr. Ring into the caboose, you heard him testify to that, didn't you?

A. I walked with him from the track over to the caboose.

Q. Did you take hold of him?

A. I took hold of his arm.

Q. Did Mr. O'Leary take hold of his arm?

A. I wouldn't say that at all.

Q. Now, you at least helped him to the caboose?

A. Got to the caboose, he walked himself.

Q. But you had hold of him? 349

A. I walked alongside of him.

Q. You had hold of him I say?

A. I had hold of his arm.

Q. And then you got orders to take him to the hospital at Dubuque, didn't you?

A. That was afterwards.

Q. At any rate you got orders to take him to Dubuque and he was taken to the hospital there?

A. Yes, sir.

Q. Now, then, Mr. Quist, on the Monday that 350
you took him riding in your Ford, how long were you gone from the house?

A. Oh, I don't know, propably half an hour or 45 minutes.

Q. How much of the time did you spend in the car?

A. Well, it was all spent in the car, only what we walked from these different places.

Q. How much time was he out of the car, five or ten minutes? 351

A. I don't know what the time was.

Q. When he walked around did he walk just as he used to before he was hurt?

A. Oh, he walked a little stooped and slow.

Q. Did he place his hand on any part of his body as he walked?

A. No, sir, he didn't.

Q. You asked or inquired if the ride hurt him, did you?

A. Yes, sir.

Q. What did he say?

352 A. He said, no.

Q. When you saw him at his home, did you ever see him in bed?

A. Once.

Q. Was he lying there quietly or tossing about?

A. Well, that night he was talking and laughing, but he was moving around.

Q. Moving around; did you see anything that indicated that he was uncomfortable as he moved around, Mr. Quist, in that cousin of yours?

353 A. Well, he said he had, he vomited a little, that was all he complained about.

Q. He told you he had pain, didn't he, there that night, in the pit of his stomach?

A. He said he felt full, that's all.

Q. Where did he put his hand when he said he felt full?

A. On his stomach.

Q. Did you hear him complaining about pain at any time?

354 A. No, sir.

Q. You never did?

A. No, sir.

Q. Did you see him after Monday and before he went back to Dubuque to die there?

A. When he went to Dubuque Sunday you mean?

Q. Yes, sir.

A. No, sir.

Q. From Monday up to Sunday, when he went to Dubuque you didn't see him after that Monday you were riding with him?

A. I seen him once or twice at the house after that ride,—I didn't understand you. 355

Q. Is that when he told you he was vomiting?

A. That is one time, yes, sir.

Q. What day was that vomiting?

A. No, I don't know.

RE-DIRECT EXAMINATION.

By Mr. Briggs:

Q. Do you know what night it was that you was in there when he was in bed?

A. It was in the middle of the week sometime, 356 I wouldn't say which night it was.

Q. In the middle of the week after you had your ride?

A. Yes.

Q. And he went to Dubuque the following Sunday?

A. Yes.

Q. And you say he was in bed that night, laughing and talking?

A. Yes, some of the neighbors sat on the bed 357 there talking.

Q. When you cut this engine off and took the slack to loosen the pin, did you have any knowledge that Ring was in between the cars?

A. None whatsoever.

Q. Or that anyone else was in between the cars?

A. No, sir.

Q. No information had been passed up to you by them?

A. No, not a word.

Q. You said you couldn't answer Mr. Davis'
358 question, one of them about whether the cars would run back if you didn't set the air or something to that effect. Will you explain just exactly what the situation would be in cutting off the cars there with the air set or with the air not set?

A. If you drift into a place the engineer sets the air,—the air is already set, that is why it isn't customary for the brakeman at any time to set the air only when the train starts away, when that is the only salvation you have. It is to stop them
359 after you have cut the engine off.

Q. When you cut the engine off did you know whether the air had been set on those cars or not?

A. No, sir, I didn't.

Q. You didn't know until the cars began to move that it was not set?

A. No, sir.

Q. Mr. O'Leary said the car where he and Ring were moved back about forty feet, and you say that you would make the distance that the car moved
360 back where you were, about 5-6 feet, is that explainable, the difference?

A. Yes, sir.

Q. In what way?

A. In the slack between the cars, in the drawbars.

Q. In the slack between the cars, extending back?

A. Yes.

Q. Would make that difference?

A. Yes, you can average about a foot, anyway, between every two cars.

By Mr. Davis:

Q. Do you want to swear now that there is a foot of slack between two cars, Mr. Quist? 361

A. Well, there is, I have seen when they would give more than that.

Q. Don't you know that on each of those couplers or between the cars, of the draw-bars, that the average slack of the cars is from 3 to 4 inches, on each car?

A. Then you have got two.

Q. And two times three is six, and two times four is eight. Now, then, Mr. Quist, when the 362 slack comes out of a train, it starts to come out pretty quick after it stops, doesn't it, as a general rule?

A. Sometimes it does, it all depends on how the air is working on the cars.

Q. If the air is working, if the air is set, the slack comes out?

A. Yes, sir.

Q. Will it come out if it isn't set?

A. It works both ways. 63

Q. This car in question that you speak of, do you now claim you saw any slack come out of that train, did you notice it?

A. I wasn't where I could see any slack coming.

Q. When you set the air on this head car, the cars came to a stop?

A. They did on the front end.

Q. You don't know what happened to the rear end, did you?

A. I couldn't see any rear end.

Q. The slack in the train is the space between
364 the different cars, whether they are a foot apart or close together, isn't it?

A. It is in the draw-bar, the slack, there is springs in there.

Q. Now, then, the slack in the train is the greatest when the slack comes out of the train where the train would be on the level rather than an incline, isn't that true?

A. Runs in going down, yes.

Q. All right; if a train is running on an in-
365 cline those cars pull out the slack all out of the train if it has incline enough to pull the cars down, isn't that true?

A. Yes.

Q. So on an incline such as you are describing, the rear end would have pulled away from the head end so as to pull the slack out when the engine came to a stop, wouldn't it, isn't that true?

A. No, not necessarily.

Q. What?

366 A. No, sir.

Q. Do you mean to tell this jury that a train standing upon this incline sufficient to allow it to drift back when it comes to a stop, with that incline that the train will not go and pull the slack out before it comes to a stop?

A. Here's the idea: You have independent air on every engine, and if the engineman stops his train with the engine air it is naturally the weight of the train will walk up against the engine, because that has such braking power that they are bound to walk up against them; if the engine

comes to a stop with engine air the cars walk up against the engine.

367 Q. If there is an incline such as to allow the cars to drift back, don't you know as a matter of fact that after the engine is stopped the slack will immediately back out of that train, don't you know that?

A. Well, not necessarily right away.

Q. Well, isn't it a fact that it would almost immediately start to pull out, if the cars were on an incline where they would drift back?

A. That all depends on the incline.

368 Q. But what was that incline?

A. Well, as I say, I wouldn't commence to state the per cent of the grade.

Q. Was there much of a grade there, was it an appreciable grade?

A. It is up-hill all the way up to the next town.

Q. Was it up-hill enough so that cars such as you had there would drift down unless the air was set, what is your answer?

A. Well, giving them a little bunt with the en- 369 gine to get the slack would naturally start them down.

Q. The bunt of the engine would start them down?

A. Just to get the slack of the pin, that doesn't take much.

Q. I mean when the engine is pulled out and you set the air on that head car, the cars would naturally have drifted down and come to a stop and the slack would be out, wouldn't it?

A. No, not with the air set on them.

Q. This engine stopped on this incline, didn't
370 it?

A. Yes.

Q. And then it stood there for some time, didn't it, before it was cut off?

A. While I walked about three car lengths.

Q. And if there was an incline sufficient to allow the cars to drift back, isn't it a fact that the rear cars would pull and pull the slack out on that incline in a very quick time? You know that as a railroad man, don't you, Mr. Quist?

371 A. Well, this place here isn't all grade all the way, that is, this siding here has got a kind of a little hog-back in it.

Q. Oh, I see, it isn't all grade clear down; your train consisted of how many cars, Quist?

A. I don't remember, 40 or 50.

Q. How far from the head car would this sag which you would go up against?

A. There is a grade, but the passing track runs lower than the main line.

372 Q. But you just said there wasn't any grade a part of the way back there where these cars went?

A. It is on this passing track, it isn't surfaced up and fixed up like the main line.

Q. But there is a dip in the track part way back in that incline?

A. A little bit, not very much.

Q. Where the cars would go back and then come up, is that right (indicating wavily)?

A. Oh, nothing like that.

Q. Oh, I don't mean that, but there was a dip there in those tracks?

A. Yes, sir, a little.

Q. There being a dip in this track where the 373
cars stood, do you mean to say that on cars with that dip the slack wouldn't pull out on those cars? What is your answer?

A. It certainly would pull out after you backed up to get the slack.

Q. Why?

A. Can't help but run back.

Q. It would pull out going up the dip just as well as down, would it, is that right?

A. Well, I have seen them pull out. 374

Q. Answer the question, would the slack pull out up the dip just as well as down the dip, Mr. Quist?

A. Well, this was way back, and I wouldn't answer you to that part.

Q. You know the condition of the track there and are familiar with it, aren't you?

A. Yes, I am familiar with it.

Q. I am asking you about this particular track, Mr. Quist, how much of a dip is there there? 375

A. Well, I will answer that the same as I do the main line, I don't know the grade at all.

Q. In that dip on that grade is it sufficient so that the cars if standing on it would roll down unless the brakes were set?

A. The brakes ought to be set when you leave a train there.

Q. I didn't ask you that, I asked you if the grade is sufficient so that the cars if standing on it would roll down unless the brakes were set,—you know that track?

(No answer.)

Mr. Davis: Well, that's all.

376 By Mr. Briggs:

Q. They did roll down, didn't they, Mr. Quist?

A. Yes, sir, they did roll down.

Q. You spoke about that you have known cars with a foot of slack between them, will you explain what you mean by that?

A. Well, some cars where the draft-timbers are of wood, with heavy loads on them some will give more and some will give less. I have seen them where you have to take a pretty fair step to walk

377 over the top of them, and others, where they have these steel frames, there is no chance to give.

Q. A difference in the springs—

A. Yes, sir.

Mr. Briggs: The defendant offers in evidence the depositions of G. C. McSperrin, A. R. Baldwin, John J. Melms and P. M. Raine.

378 I will omit the formal part of the stipulation and start out with the testimony of Mr. G. C. McSperrin, in the County of Fayette, state of Iowa, taken before Beatrice Becker, a Notary Public, by virtue of the notice hereto attached as stated in the return thereto.

Mr. O'Brien:

Q. You may give your name to the reporter?

A. G. C. McSperrin.

Q. Where do you reside?

A. 116 3rd St. North, Oelwein, Iowa.

Q. What is your present occupation?

A. Conductor for the Chicago Great Western 379
Railroad Company.

Q. In what service?

A. Freight service.

Q. Where is your run?

A. Between Oelwein and East Stockton.

Q. Oelwein, Iowa, and East Stockton, Ill.?

A. Yes, sir.

Q. How long have you been on this run?

A. I have been in service six years this coming September. 380

Q. Do you pay your expenses when you are out on the road?

A. Sometimes, and other times we eat in the caboose.

Q. When you pay your expenses other than what you incur by living in the caboose, do you know what it will cost you per month?

A. Around forty dollars.

Q. Were you acquainted with Edmund Ring during his lifetime? 381

A. Yes, sir.

Q. Do you recall of his meeting with an injury?

A. Yes, I was talking with him after the injury.

Q. Where were you talking with him?

A. On the corner of Third Street North.

Q. How far from his home was that?

A. It was about a block and a half from his home.

Q. You may state whether or not at that time he made any complaint of pain and suffering?

A. I asked him how he felt and he said he was

getting along as well as could be expected at the
382 time.

Q. That's all.

Testimony of A. R. Baldwin, in the county of Fayette, state of Iowa, taken before Beatrice Becker, a Notary Public, by virtue of the notice hereto attached as stated in the return thereto.

Mr. E. R. O'Brien:

Q. You may give your name to the reporter?

383 A. A. R. Baldwin.

Q. Where do you reside, Mr. Baldwin?

A. Oelwein, Iowa, I do not recall the street number.

Q. What is your present employment?

A. Trainman on the Chicago Great Western Railroad Company.

Q. In what capacity?

A. As brakeman.

Q. Where do you run?

384 A. Between Oelwein and Stockton.

Q. Oelwein, Iowa and Stockton, Ill?

A. Yes, sir.

Q. How long have you been on this run?

A. About two and one-half years, approximately.

Q. When you are out on your run from Oelwein to Stockton where do you board and room?

A. We board at Stockton.

Q. Do you take your meals in the caboose or restaurants?

A. I eat at restaurants.

Q. Do you know what it will cost you an average per month when out on your run? 385

A. Between forty and fifty dollars.

Testimony of John J. Melms, in the county of Fayette, state of Iowa, taken before Beatrice Becker, a notary public, by virtue of the notice hereto attached as stated in the return thereto.

Mr. O'Brien:

Q. You may give your name to the reporter?

A. John J. Melms. 386

Q. Where do you reside?

A. 116 3rd Street North.

Q. In what city?

A. Oelwein, Iowa.

Q. What is your present occupation?

A. Brakeman on the Chicago & Great Western Railroad.

Q. In what service?

A. Trainman.

Q. Freight or passenger? 387

A. Freight.

Q. Where is your run?

A. Between Oelwein and Stockton.

Q. Oelwein, Iowa and Stockton, Ill?

A. Yes, sir.

Q. When you are out on your run do you board in the caboose or in restaurants and cafes?

A. In restaurants and cafes.

Q. How much an average per month does it cost you for expenses on the road, for board, room and incidentals?

A. About sixty dollars per month.

388

Testimony of P. M. Raine in the county of Fayette, state of Iowa, taken before Beatrice Becker, a notary public, by virtue of the notice hereto attached as stated in the return thereto.

Mr. O'Brien:

Q. What are your initials, Mr. Raine?

A. P. M.

Q. Where do you live?

389 A. Temple Block, Oelwein, Iowa.

Q. What is your present occupation?

A. Brakeman.

Q. For what railroad?

A. Chicago, Great Western Railroad Co.

Q. What service, passenger or freight?

A. Freight.

Q. Where is your run?

A. Oelwein, to East Stockton, Ill.

Q. How long have you been on this run?

390 A. Three years.

Q. What is your average monthly expenses away from the terminal at Oelwein?

A. Between $40 and $45 per month.

The defendant offers in evidence the depositions of Marjorie Phillips, Mildred Kinney and Elizabeth Cahill.

Testimony of Marjorie Phillips, in the county of Dubuque, state of Iowa, taken before Walter Koer-

ner, a notary public, by virtue of the notice hereto attached as stated in the return thereto.

391

By Mr. Geo. T. Lyon:

Q. State your name?

A. Marjorie Phillips.

Q. Where do you reside?

A. Dubuque, 2135 Jackson Street.

Q. What is your business, Miss Phillips?

A. In training at Mercy Hospital.

Q. As a nurse?

A. A nurse.

Q. How long have you been engaged in that work? 392

A. A year and a half.

Q. Were you acting as nurse at Mercy Hospital on or about the 4th of October, 1922?

A. Yes, I was.

Q. Do you remember of a patient being brought there on the 4th of October, by the name of Edmund Ludwig Ring?

A. Yes.

Q. Did you take care of him as a nurse during the time that he was there? 393

A. Why, I had charge of the floor at night and he was a patient on general and I took care of him on general at night, I was night nurse on that floor.

Q. Do you remember, Miss Phillips, about what time of the day he was brought in?

A. Well, I wasn't there in the day time, I was just there at night, but the first time he was brought in about 7:30 or 8:00 o'clock, I think it was.

Q. In the evening?

A. In the evening.

Q. And did you have charge of him that night?

394 A. Yes, I did.

Q. Can you state in a general way what you observed about his condition at that time?

A. Well, the first night he was in he didn't seem to have so very much pain, he was very restless, he couldn't sleep but he didn't complain of much pain.

Q. What if any treatment was administered for him at that time?

A. Do you mean the first night he was in?

395 Q. Yes.

A. The doctor had ordered morphine, he was given morphine the first night he was in.

Q. Was he given morphine more than once?

A. No he was not, just once.

Q. And how did he seem to rest that first night?

A. Well, fairly well after he had gotten the morphine.

Q. How long did he remain in the hospital at that time?

396 A. Well, I don't remember just exactly, I think he was there for two nights the first time he was there.

Q. The second night do you recall whether or not any morphine was administered to him?

A. No, I know there was no morphine administered but I do not remember just what kind of a night he had; I know he didn't get any morphine.

Q. Do you know whether or not he complained of pain during the rest of the time he was there on the first occasion?

A. No, he didn't.

Q. Did he leave the hospital after being there two nights and a day? 397

A. Yes, I think he did.

Q. Do you remember when it was, if at all, that he returned to the hospital?

A. I don't remember what day it was.

Q. About how long after he had been there the first time?

A. I don't just remember how long it was.

Q. Well, when he came to the hospital the second time do you remember about how long he remained there? 398

A. No, I don't know how long he was there.

Q. Did he remain in the hospital until the time of his death?

A. Yes, he did.

Q. Did you have charge of the floor at night?

A. At night I had charge of the floor.

Q. During all the time that he remained there?

A. Yes.

Q. Do you recall whether or not he complained of suffering any pain during the second time he 399 was at the hospital, up to the time of his death?

A. Well, not as far as I can remember he never complained of any actual pain, of course he was always more or less uncomfortable, but he never complained of any pain that I remember of.

Q. Do you remember whether or not any morphine was administered to him during the second time at the hospital?

A. Not that I know of, I don't remember of any

Q. I think that is all.

CROSS-EXAMINATION.

400 By Mr. Ernest A. Michel:

Q. Miss Phillips, during the time that Mr. Ring was in the hospital you say that you had charge of one of the floors?

A. At night, yes.

Q. You were not in charge of Mr. Ring?

A. No, I had the floor in general, he was on general.

Q. About how many patients did you have to look after in addition to Mr. Ring?

401 A. I don't know, I remember that we were quite busy at the time, I really couldn't say just how many patients.

Q. Could you give us approximately the number—would you say in the neighborhood of twenty?

A. Around twenty anyway.

Q. That would be your best judgment, about twenty?

A. Yes.

402 Q. About how often each night would you see each patient?

A. Well of course they always rang their bells whenever they wanted anything, sicker patients needed more attention, some slept all night and some needed—they were all—I really don't know just how often each patient—

Q. In your work you would see the patients each night as they would call for you?

A. Well, we always went around too, you know, made sort of the rounds.

Q. About how often would you make the rounds, or make the calls? 403

A. We didn't have any certain time, don't you know,—like if we were going down the hall, it might be every hour, we would look in at the patients.

Q. I want to get a general idea of what you were doing—you would go around during the evening generally and observed the different patients, sometimes you might see the patient every fifteen minutes and sometimes you might not see the patient for two or three hours? 404

A. Yes.

Q. And the patients that complained the most you would probably see the most often, and unless the patient would call for you during the night or ring the bell that he had you wouldn't see that patient at all except as you made a sort of general inspection?

A. Around, yes.

Q. Did you make a record of your doings and the condition of each patient during the time that Mr. Ring was in the hospital? 405

A. Well, the charts were kept, every patient has a chart.

Q. When you were working did you keep a chart for Mr. Ring showing his condition and the treatment you had given him?

A. Yes.

Q. And on this chart you would indicate for instance if you had given the patient an opiate such as morphine?

A. Yes.

Q. And on which you also indicate his condi-
406 tion as to being restless, or as to whether he slept well?

A. Yes.

Q. And you made such a record during the time that Mr. Ring was in the hospital so far as relates to the time you were on duty?

A. Yes.

Q. Have you that record with you?

A. Why, no.

Q. Where is that record?

407 A. I think the hospital keeps all the records.

Q. You think that is still at the hospital?

A. I think so.

Q. At what hospital?

A. Mercy Hospital.

Q. In the City of Dubuque, Iowa?

A. Yes, sir.

Q. Who was the physician in attendance upon Mr. Ring?

A. Dr. Pond.

408 Q. Is the physician from whom you received your instructions as to what should be done with Mr. Ring?

A. Yes.

Q. Did you receive from him any instructions as to opiates?

A. No, I didn't.

Q. Did you yourself administer the morphine at the time you stated you believe that he was given morphine?

A. No, I didn't.

Q. Who gave him the morphine?

A. The nurse in charge of the dispensary.

409 Q. What is the name of that nurse?

A. I don't remember who was on duty that night.

Q. I believe you stated in answer to Mr. Lyon's question that Mr. Ring was very restless the first period when he came in there, he couldn't sleep?

A. Yes.

Q. The second night he was there your recollection isn't very clear as to his condition?

410 A. No, I don't remember about the second night.

Q. And of course you are ony giving as to his condition just a general idea of what you can remember of one of a number of patients who were under your care?

A. Yes.

Q. This nurse who was in charge of the dispensary and who administered the opiates, what was her name?

411 A. I don't remember who the nurse was then, what one was on.

Q. You don't know whether that same nurse is still at the hospital or not?

A. If I could remember who it was I could probably tell you but I don't remember who the nurse was that was on duty then.

Q. About how many times, or are you able to tell how many times, you saw Mr. Ring the first two nights he was at the hospital?

A. I don't remember.

Q. You of course, as you stated before, you saw
412 a number of patients during your work and you wouldn't be able to say how many times you saw him?

A. No.

Q. Or would you be able to remember what, if anything, he said?

A. No, I don't remember.

Q. And this would also be true of the second period when he came back, which I believe was about October 11th, and he remained until about
413 the 15th, that would be true, would it not?

A. Yes.

Q. Do you ever remember of seeing the lady who sits by me here who is Mrs. Ring, who is the wife of the man who was in the hospital, do you remember of seeing her at the hospital?

A. No, I don't know if I remember her or not.

Q. You say you don't remember whether you saw her there or not—your memory is somewhat hazy as to the whole matter, is it not?

414 A. Yes.

RE-DIRECT EXAMINATION.

By Mr. Lyon:

Q. When did you, if at all, last see the chart of the patient Ring that was made at the time?

A. When I had charge of the chart.

Q. When did you see, if anything, you wrote or kept on the chart that you don't recall?

A. The charts are kept at the hospital, I don't know if anyone else has them or not.

RE-CROSS-EXAMINATION.

415

By Mr. Michel:

Q. Miss Phillips, when did you first know that you were to be a witness at this hearing?

A. I don't remember the day it was—it was some time ago that the Sisters at the hospital told us about it—I couldn't tell you.

Q. Was it two weeks ago or a month ago?

A. It seems like it must be two or three weeks ago.

Q. And up until that time you had no opportunity again to have called to your attention anything about Mr. Ring? 416

A. No, I never.

Testimony of Mildred Kinney, in the county of Dubuque, state of Iowa, taken before Walter Koerner, a notary public, by virtue of the notice hereto attached as stated in the return thereto.

417

DIRECT EXAMINATION.

By Mr. Geo. T. Lyon:

Q. Please state your name?

A. Mildred Kinney.

Q. Where do you live?

A. Winthrop, Iowa.

Q. Where are you employed?

A. At the Mercy Hospital.

Q. How long have you been employed there?

A. Three years in September.

Q. In what capacity?

418 A. As a nurse, student nurse.

Q. And you were employed at the Mercy Hospital in Dubuque on or about the 4th of October, 1922?

A. Yes.

Q. Do you remember a patient by the name of Edmund Ludwig Ring being brought to the hospital?

A. Yes.

Q. Did you have anything to do with his care

419 in the capacity of a nurse while he was there?

A. Yes, in the day time.

Q. Was he at the hospital on more than one occasion?

A. Yes.

Q. How many?

A. On two different ones that I know of.

Q. On the first occasion when he was brought to the hospital do you remember whether or not he complained of suffering and pain?

420 A. I can't recall very much when he first came, it was mostly on the second time that he was there that I took care of him.

Q. Did you take care of him the first time when he was there?

A. No, I didn't, but I had charge of the floor and I remember when he came in, but I don't remember which nurse took care of him.

Q. Do you remember how hong he stayed there on the first occasion?

A. Not exactly, but I think two nights and a day, if I recall.

Q. Do you know personally whether any opiates were administered to him during the first time that he was at the hospital? 421

A. I saw the chart this morning.

Mr. Michel: Don't state what you saw from the start.

A. There was one hypodermic of morphine that was given that I know of.

Q. Is that all the opiates that were administered to him so far as you know?

A. Yes.

Q. Do you know how he left the hospital? 422

A. Do you mean the way he left? No, I couldn't state as to that.

Q. I mean the first time?

A. He wasn't carried out, I don't think—he wasn't taken in the ambulance, I know.

Q. He was able to move himself?

A. Yes.

Q. Do you remember how long it was after he left the first time when he returned?

A. Not definitely, I don't, probably two weeks, something like that. 423

Q. Do you recall, Miss Kinney, about how long he was at the hospital the second time, before he died?

A. I think around two weeks, ten days or two weeks so far as I know.

Q. And during the time that he was in the hospital you had charge of the floor on which he was located?

A. Yes.

Q. During the day time?

A. Yes.

424 Q. Did you keep the chart of his condition during that time?

A. Practically all the time I did.

Q. Do you recall, Miss Kinney, whether or not any opiates were administered to him during his second time at the hospital?

A. No, I don't think there were any given him.

Q. Do you recall whether or not he complained of suffering any pain during that time?

425 A. Not especially, no, he was uncomfortable most of the time but he never complained of any severe pain or any pain to speak of.

Q. How did he seem to rest as a general proposition during that time?

A. Well, he used to sleep quite a bit in the day time, not all the time but at different intervals he would take little naps.

Q. Was there any other nurse who assisted you during the day?

426 A. O, yes, several.

Q. You mean with his care?

A. Different ones—just whoever I happened to meet that was around I would ask them to help me.

CROSS-EXAMINATION.

By Mr. Michel:

Read by Mr. Michel.

Q. You say, Miss Kinney, that you are still a student at the hospital?

A. I have graduated but I am still there until fall.

Q. Until fall, as a part of your general training?

427

A. Yes.

Q. Is that the way that institution is conducted, and you say the first time he was in there you don't recall very much about the man?

A. No.

Q. Up until say a couple of weeks ago you had no occasion to recall this particular man, did you?

A. No, I didn't.

Q. There was nothing unusual about his case that would fix anything particularly definite in your mind as to him?

428

A. No, I can't say that there was.

Q. Would you be able now to describe the man?

A. His general condition?

Q. General appearance of Mr. Ring, weight, height, color of his hair and eyes?

A. I don't believe I would, a very accurate description of him.

Q. You don't think you could,—you wouldn't swear that he didn't complain of pain?

429

A. I don't know so very much about the first time he was there.

Q. You wouldn't want to swear on your oath that he didn't complain of pain those two days?

A. No.

Q. Was he in the ward or private room?

A. Ward both times.

Q. About how many people were there in the ward?

A. Two—different beds, his bed and another patient's bed.

Q. You spoke of opiates; now in your exper-
430 ience I presume you have run across different classes of patients, some patients complain a great deal and others are more phlegmatic and don't complain very much, that's true is it not?

A. Yes.

Q. And Mr. Ring you say was of the type that don't complain a great deal?

A. Yes.

Q. But he did appear to you to be uncomfortable most of the time?

431 A. Yes.

Q. The name of the nurse who gave him the opiates, do you know that?

A. I think it was Miss Keefe, if I am not mistaken, I am not positive but I think that was the nurse.

Q. Do you know if he was given anything else to induce sleep, anything such as veranol, or bromides, or anything of that kind?

A. Not that I recall.

432 Q. Do you recall as to his body, as to whether he was bandaged or strapped with adhesive tape?

A. I don't believe I remember about that.

Q. Do you ever remember of seeing the lady who sits back of me, who is Mrs. Ring?

A. Yes, I do.

Q. Do you remember of seeing her at the hospital?

A. Yes.

Q. Do you ever recall being there when Mrs. Ring was there, when an opiate was given to him?

A. No, I don't.

Q. And you first knew you were going to be a witness in this case about two weeks ago? 433

A. I think that's about the time.

Q. And up until that time you had nothing in particular to call this man's condition to your attention?

A. No.

Q. That's all.

RE-DIRECT EXAMINATION.

By Mr. Lyon: 434

Q. You say you did look at the chart this morning?

A. Yes, sir.

Q. Did that refresh your memory as to what you did?

A. Well, somewhat it did, but I remembered pretty much what I did for him before that.

Q. So that you recall this patient clearly?

A. Yes.

435

RE-CROSS-EXAMINATION.

By Mr. Michel:

Q. You don't mean to say now that you remember him clearly?

A. I don't remember everything exactly clear as if it happened yesterday, but I remember the case.

Q. And you remember that there was such a man as Mr. Ring there and you attended him?

A. Yes, and this trouble.

Q. Don't you know as a matter of fact that he
436 was bandaged over his abdomen with adhesive tape?

A. I can't recall that.

Q. Would you know that if that were a fact?

A. I probably would at the time, but I don't remember whether he was strapped or not.

Q. Well, you do remember clearly that Mr. Ring was there, so that the record will be straight, you don't claim to remember everything that he said or other detail as to his condition, do you?

437 A. No.

Q. And during the time that he was there you would give him baths or rubs, or anything of that kind?

A. Yes.

Q. And if you did anything of that kind of course if he were strapped with adhesive tape you would learn that fact, would you not?

A. Yes.

Q. And you would say now that you don't re-
438 member whether there was such adhesive tape over his abdomen or not?

A. No, I don't.

Q. You also say, as did the other lady who testified, that you attend to a number of people in the hospital there in October did you not?

A. Yes.

Q. And you don't make any pretense to remember everything that was said, or exactly his condition at all times?

A. No.

Testimony of Elizabeth Cahill, in the county of Dubuque, state of Iowa, taken before Walter Koerner, a notary public, by virtue of the notice hereto attached as stated in the return thereto. 439

DIRECT EXAMINATION.

By Mr. Geo. T. Lyon:

Q. Please state your name?

A. Elizabeth Cahill.

Q. Where do you live, Miss Cahill?

A. Lamont, Iowa.

Q. What, if any, work do you do? 440

A. I have been a student nurse at Mercy hospital.

Q. How long have you been working in that capacity?

A. Two years this coming September.

Q. Were you at Mercy Hospital on or about the 4th of October, 1922?

A. Yes, sir.

Q. Do you remember of a patient by the name of Edmund Ludwig Ring? 441

A. Yes, sir.

Q. In your capacity as student nurse did you care for him?

A. Yes, sir.

Q. During the night or day were you on?

A. Miss Kinney was senior on the floor and I was second senior, if I remember correctly, and when she was gone on her hours I was next to oversee the patients, that's about as I remember.

Q. Did you care for Mr. Ring during both of the times that he was at the hospital?

A. No, sir, just the last time.

442 Q. And how frequently if you recall, did you see him during the last time that he was there?

A. Well, if I was on the floor I would imagine about once every hour, or maybe oftener.

Q. Do you know whether or not any opiates were ever administered to Ring while he was there?

A. No, not that I know of.

Q. During the time that you were working on the floor where he was confined do you remember of his complaining of his suffering pain?

443 A. No, I don't, he was uncomfortable, but never complained of any pain that I know of.

Q. Do you remember, Miss Cahill, about how long he was at the hospital the second time before he died?

A. I couldn't state that.

Q. Approximately?

A. Well, I wouldn't like to say because I wouldn't be sure.

Q. But during the time he was there would you

444 see him more or less every day?

A. Yes.

CROSS-EXAMINATION.

By Mr. Michel:

Q. How do you know he was uncomfortable?

A. He complained of being uncomfortable.

Q. How often?

A. Well, I wouldn't say that every time I went in he was uncomfortable, but as a rule.

Q. And you judge he was uncomfortable by the complaints he made to you?

A. Yes.

Q. Where or in what part of his body would he indicate that the discomfort was, or would he indicate where he was uncomfortable? 445

A. He wouldn't say, he didn't state.

Q. What do you recall that he said or did that indicated to you that he was uncomfortable?

A. Sometimes I would be in he would seem pretty good and other times he was discouraged, seemed very uncomfortable.

Q. Seemed very uncomfortable?

A. Yes. 446

Q. That was his condition on or about the 15th of October when he came back, that was about the time he came back, wasn't it?

A. Yes.

Q. Then he died about the 21st?

A. I imagine it was about that.

Q. During that time was when you said that he complained of being uncomfortable?

A. Yes.

Q. And during the time that you saw him was 447 in the day time?

A. In the day time, yes.

Q. And part of that time Miss Kinney was also on duty?

A. Yes, sir.

Q. And you, I believe, are in training at this hospital?

A. Yes, sir.

Q. You are a student nurse?

A. Yes, sir.

Q. And about when will you complete your
448 course at this hospital?

A. A year from this September.

Q. You stated on your direct examination that he had been administered no opiates that you knew of, you had in mind, did you, the administration of opiates as testified to by Miss Kinney, or did you refer solely to matters that came under your personal observation?

A. I don't quite understand.

Q. Miss Kinney, I believe, stated that so far as
449 she recalled there was at least one time that he was given some morphine or drug to quiet him or induce sleep,—you have no personal recollection of that?

A. No, I haven't.

Q. When did you first know you were going to be a witness in this case?

A. Yesterday afternoon.

Q. And up until that time you had nothing in particular to call this man to your attention?

450 A. No.

Q. And you don't pretend to remember everything that the man did during the times you observed him at the hospital, do you?

A. No, I don't.

Q. Nor what he said?

A. No.

Q. In fact, you wouldn't be able to give us a very accurate description of the man, would you?

A. No.

A. M. POND,

451 was called as a witness on behalf of the defendant and duly sworn.

DIRECT EXAMINATION.

By Mr. Briggs:

Q. Doctor, what is your profession?

A. I am a physician and surgeon.

Q. How long have you been a physician and surgeon?

A. 32 years. 452

Q. Where are you located?

A. Dubuque, Iowa.

Q. Where did you study?

A. In the University of the City of New York, and the University of Iowa.

Q. Did you spend any time in Europe?

A. Eighteen months in Europe.

Q. Where?

A. Berlin, Leipzig, Heidelberg, Edinburg, Scotland, Paris. 453

Q. Your specialty is surgery?

A. Surgery and surgical pathology, yes, sir.

Q. Did you know Mr. Ring, the deceased, who has been mentioned in this trial?

A. Yes, sir.

Q. Tell us when you first met him and under what circumstances?

A. I met him one evening about eight o'clock, I would judge, along the fore part of the evening, anyway. I went down to the Great Western station on a call from the dispatcher. I went into the

caboose and found the man Ring in the bunk, and
454 the conductor,—I asked the conductor where was the injured man, and he took me over to this bunk. I do not remember of ever seeing Mr. Ring before. I stepped down and said, hello, and he says hello; and I says, where are you hurt, and he says right in the belly. I says how did you get hurt? He said, I got caught by a chain. Well, I says, are you in a great deal of pain now? and I took his pulse, the pulse at that time was 76.

Q. What is normal?

455 A. Oh, from 72 to 78. I says, how do you feel? He says, I feel better now. I says, have you vomited? He says, I just vomited. I asked the conductor who was there and another gentleman that I didn't know at that time, but I have learned since that his name was Quist, if he had vomited, emptied his stomach, the stomach contents, of food; I asked if there was any blood, and he said no. I asked him if he was in pain then, and he said, I am not in pain exactly, but I feel tough. I
456 asked him if he was able to get out to the car and get into my car, and he said yes. I don't remember whether I helped him; it occurs to me now that he had his shoes off and they helped him find his shoes and get his shoes on. And he got up and I preceded him, I went ahead of him, and he came down out of the car and down the steps, and walked across the platform, and Dr. De Lacroix, who accompanied me, was on one side of him and I was on the other side of him. I may have had hold of his arm, but he was going under his own power,

and he was not in apparently any great discomfort.

457 I got him to the hospital, and my first impression after I got his clothes off from him was that he had a broken rib; if he had a fragment of a rib turned in, that would cause some trouble, some damage, and that is why I put on this adhesive tape that you have heard about. I put on two pieces of adhesive tape to hold this side of him, he was having a hard time breathing. Every time he breathed this would pain him, this would hurt, and then he would be uncomfortable. I put this ad- 458 hesive strap on thinking probably he might have had a fractured rib, or may have had an injury to the bones of the back. We got him to the hospital and got his clothes off from him and got him into bed, and then I examined him thoroughly to find marks, if any, on his body; what we call hyperemia. It is not an inflammation, it is just a dilatation of the blood vessels of the skin, or if you pinch yourself you can get red; and that showed across the fore part on the right side of the abdo- 459 men, right about here (indicating). On the back there was another little streak of red, and that extended directly opposite from the one in front.

And then I put on this adhesive tape, as I say, to make it easier for him to breathe, and if there was a broken rib there, to hold it into position, and ordered him to the X-ray room next morning. I wanted to know what damage there was done to the bony structure of this man's body. As I left the room where he was I stepped into the nurse's

room, or the order-room, as we call it, and I wrote
460 on the chart.

Mr. Davis: We will object to what he wrote as not the best evidence, and hearsay.

A. I ordered a dose of morphia, one-quarter grain, if required, for pain.

Q. That was the first night?

A. That was the first night. I saw him the next morning, I stepped into the record-room and read the record, which indicated—

Mr. Davis: Don't state what the record showed,
461 the record isn't here, you can't state that, doctor, objected to as hearsay and self-serving.

No ruling.

Q. Just state what you did and saw?

A. Well, I recollect that he had been given this dose of morphia, one-quarter grain, and that afterwards he had a comfortable night. At that time he was taken to the X-ray room,he had been refused food up to that time and until after he came back from the X-ray. I didn't want to get any picture
462 of the food, I didn't want to get any more obstruction to the picture than I could help. I let him have his breakfast. I saw him in the afternoon and he wanted to know when he could go home. I asked him how he felt, he said I feel pretty good. I said, I can see no reason why you couldn't go home if you want to. He says, will you arrange for my transportation? I says, yes.

I got a report of the X-ray, there was no—

Mr. Davis: I object to the report of the X-ray as not the best evidence, hearsay and self-serving.

No ruling.

Q. Doctor, what was your conclusion as to his condition at that time? 463

A. I concluded that there was no broken rib, no broken bone in his body, that there was no evidence that he had suffered a very severe injury, and notified the claim agent that he would be able to give a statement.

Mr. Davis: Objected to as self-serving and immaterial and incompetent.

Court: Objection sustained.

A. Well, the next morning I gave him my permission to go home when he got ready, and I would 464 help him get some transportation. That is the last time I saw him the first trip.

Q. Did he leave the hospital then?

A. He left the hospital, I don't know when he left the hospital; he was not there that evening.

Q. When did you next see him?

A. The next time I saw him was Sunday afternoon, October 15, 1922, at the Chicago & Great Western station.

Q. What was his condition at that time? 465

A. He was accompanied by a lady whom he introduced to me as his wife. I helped them into my automobile and took them again to Mercy Hospital, and admitted him there for the second time.

Q. Sunday afternoon?

A. Sunday afternoon.

Q. Do you remember what day it was that he came to the hospital the first time?

A. Wednesday, I believe.

Q. Wednesday night?

A. I believe it was Wednesday evening.

Q. Which Sunday after that Wednesday was
466 it he returned?

A. Oh, it would be Wednesday, the 4th of October, if I remember correctly, and it would be Sunday, the 15th—it would be a week from the following Sunday, that would be about ten days.

Q. About 10-11 days?

A. 10-11 days.

Q. What was his condition upon his return?

A. His condition wasn't as good as it was when he went away.

467 Q. In what respect?

A. Well, when he left me, the last time I saw him he was standing erect and walking very well; as he approached me from the car he was stooped. I got him into my car and drove to the hospital, and I asked him in driving if the jar of the car hurt him, and he said no. I didn't drive very fast, I tried to make it as easy for him as I could; it is a very hilly town, I drove as cautiously and as carefully as I could. I got him to the hospital
468 I should judge about four o'clock, he was admitted and put to bed.

Q. Did you see him after that on how many times?

A. Oh, I saw him every day, I saw him three or four times a day.

Q. What was his condition during that time, pulse, respiration, temperature?

A. His pulse would vary, his pulse would vary from normal—and what I mean by normal would be about 72 to 76—at one time I saw him his pulse.

—I found his pulse at 110, but that was unusual for a man that had the injury that he had.

469

Q. Did it vary in between those figures?

A. Yes, it would vary.

Q. How about his temperature?

A. The first temperature I took was about 96 or 97, 97.6, if I remember correctly, that is slightly below normal. The highest temperature that I saw was 100, possibly 100.1—we measure those by tenths.

Q. Was that the first time he was there, the first time he was there?

470

A. The temperature that I am speaking of now?

Q. Yes.

A. Well, the first temperature of over 100 that I saw was the first night he was there.

Q. It never reached 100 after that?

A. No.

Q. How was his temperature during the last time?

A. The temperature during the last period was quite consistenly subnormal. 471

Q. Consistently,—would it indicate any serious condition?

A. Yes, it always indicates a serious condition, a subnormal temperature always indicates a serious condition.

Q. What was his respiration?

A. His respiration didn't vary so greatly; his respiration,—the normal man breathes about 18 to 20 times a minute, and his beathing was not far

from that time; along towards the last it grew
472 rapid, 30 maybe, 36.

Q. What complaint did he make to you of pain and suffering?

A. I can't say that he ever used the word "pain" —he would say that he felt uncomfortable, and I would ask him how, and he would say he felt full, and put his hand over his abdomen, here, (indicating), or he felt nauseated, he felt sick to his stomach, that's the way he used to put it. I don't recall that he ever used the word "pain."

473 Q. Was there anything done for this nausea that he complained of?

A. Yes.

Q. What?

A. Why, we washed the stomach out.

Q. And what would result?

A. There would be relief; I think every time that we washed that stomach out he would say that he felt better.

Q. Did you after his death assist in an autopsy?

474 A. Yes.

Q. And did you determine what his real trouble was?

A. I determined what the findings were at the autopsy.

Q. Well, to your own satisfaction, did you come to a conclusion?

A. Yes.

Q. Did the other doctors agree with you?

Mr. Davis: Objected to as heasay, incompetent, irrelevant and immaterial.

No ruling.

Q. Well, what conclusion did you come to as to what the injury he received was? 475

A. My deduction from this autopsy and post-mortem examination,—my deduction from this autopsy was that this man died from a bruising of one of the largest veins of the abdomen, what we call the superior mesenteric vein; the largest vein, —one of the largest veins in the abdomen is the vein that leads from the intestines into the liver, and that vein is probably the size of my finger there (indicating), and this mesenteric vein is probably the size of that finger (indicating), and 476 about an inch from this portal vein.

This mesenteric vein that I speak of had been bruised sufficiently, the thin lining membrane, the little, fine, tender delicate membrane of that vein had been crushed or broken or bruised or contused until the ends had separated and the ends curled, causing a clotting of blood, and completely stoping any drainage of blood from the entire intestines, because all of our intestines are supplied by the mesenteric artery and they are all drained by 477 the mesenteric vein; this artery goes into a large hand-like membrane, you have seen it perhaps in hogs, and that artery and vein go in side by side. The artery gives the arterial blood to all the intestines, and all of those thin fine capillaries collect that blood and draw it back and then discharge that blood into this large vein, that discharges it into the portal vein and goes into the liver. And this vein just before it goes from the portal vein was bruised so the ends curled in each direction.

causing that clotting, and the intestine was not being drained from its arterial blood.

478 Q. There are two kinds of nerves?

A. Yes.

Q. Motor nerves and sensory nerves?

A. Motor nerves and sensory nerves.

Q. Tell us what nerves were injured by this and what effect it would have upon the sensory nerves?

A. The venous stasis, the venous stagnation, of course would prevent any intestinal movement.

479 Q. That would mean stoppage of blood?

A. Yes, because you have got to have good circulation before you can have any movement. As long as the circulation was not good, the arterial blood was not impaired, but the drainage of that arterial blood was impaired, and we had a complete intestinal stasis. I mean by that a complete relaxation, no movement in the intestines. Although we didn't get a bowel movement, having intestinal stasis, I gave hypodermic injection of

480 atropin to stimulate, helping to stimulate that intestinal cavity, and we would wash his stomach out and relive the fulness; that is, he couldn't get motion in his abdomen, but there was no mucous membrane of the stomach injured, and there was no mucous membrane of any intestine injured, there was nothing of that kind that showed in the X-ray findings.

Mr. Davis: We object to the last statement of the doctor as heasay.

Mr. Briggs: That may be stricken.

Q. Doctor, you spoke about atropin?

A. Atropin, that was given hypodermically. 481

Q. More than once?

A. Oh, yes, every four hours.

Q. Was there any morphia in that?

A. No, sir.

Q. When, if ever, except that first night was there any morphine given?

A. He was never given but one dose of morphine, and I was there in the hospital both times; he was given that the first night he was in the first time.

482

Q. Was there any sedative or narcotic given to relieve pain at any time?

A. No, sir.

Q. And this other drug that is spoken of was given for what purpose?

A. To help stimulate those intestines to regain his activity. Of course I had no positive knowledge of what did happen, I knew that there had been a contusion of that abdomen; he might have had a little tear in the stomach or intestine, I 483 didn't know. I was pretty near reasonably sure that it would—that he had intestinal paralysis. I hoped that the atropin would stimulate that intestinal activity so that this boy's bowels would move and relieve him nauseating, this nauseating and vomiting was due to a paralysis or stasis of the intestines.

Q. While he was there under your care either the first or last time, did he vomit any blood?

A. I never saw him vomit blood, and never was informed that he vomited blood.

Q. From the injuries that you observed was
484 there any reason why he should vomit blood?

A. No.

Q. Why?

A. Because there was no injury to the mucous membrane, there was no injury to the stomach wall or the intestinal wall. I mean that we learned that from the condition that we found after death, from this postmortem examination.

Q. Have you told us all the complaints he made to you of pain and suffering?

485 A. He would frequently say that he felt tough, that he felt sick to his stomach, and that he felt full; those were the words that he made to me, those were the words that he said to me.

Q. Did he ever use the word "hurt"?

A. Not that I recall, I don't remember.

CROSS-EXAMINATION.

By Mr. Davis:

Q. Doctor Pond, if a man says he feels tough,
486 does it indicate that he is suffering any pain, to you?

A. Not necessarily, sir.

Q. When you know a man to be hurt, as you know this man had been hurt,—he told you he had been hurt?

A. He said he was caught by a chain.

Q. Didn't that indicate to you that he was suffering any pain, that he would tell you that he felt tough, at all?

A. In fact, I had asked him if he was in pain, and he said no, he was not.

Q. Do you mean to tell this jury that you asked him every day if he was in pain? 487

A. I usually made it a point to ask him how he felt.

Q. He answered that he felt tough, didn't he?

A. Not every time, I think he only used the word "tough" once.

Q. What other word did he use?

A. He said he would feel nauseated, and he would feel full.

Q. When he first came in you took an X-ray, didn't you? 488

A. I did not, I ordered it to be done.

Q. And you looked at it, you examined it?

A. I examined it.

Q. An X-ray is taking a picture of the inside?

A. Yes, sir.

Q. And that would show the condition of the bones as well as the condition of the abdomen, would it?

A. It would show nothing at all but the bones.

Q. It wouldn't show any condition of the abdomen? 489

A. Not in the condition that he was in, he was not prepared for an extra intestinal tract examination.

Q. You presumed, after learning how he was hurt, that he had received some injury to the abdomen, didn't you?

A. I hadn't made up my mind, sir, I was simply anticipating—I wanted to know, I wanted to be sure.

Q. There is a way to take an X-ray of the abdo-
490 men showing its condition, isn't there?

A. Yes.

Q. You didn't take any?

A. Not at the first time I did not.

Q. Did you the second?

A. Yes, sir.

Q. When?

A. Somehow I didn't enter the exact time.

Q. Where are the X-rays?

A. They are at Dubuque, I think, at Mercy Hos-
491 pital.

Q. When did you last see them?

A. I haven't seen them since I examined them and passed an opinion on them to get my working diagnosis when Mr. Ring was entered.

Q. You haven't seen them since?

A. No, sir.

Q. And you haven't them here so other doctors can examine them?

A. No.

492 Q. They are at Mercy Hospital?

A. I don't know.

Q. It is usual to keep them there?

A. Yes, sir.

Q. You of course could have got them here by inquiring or asking the hospital for them?

A. I doubt it, I don't believe they allow those plates to get out of that place.

Q. Do you mean to say that you couldn't get those plates out of the hospital?

A. No, I don't believe I could get those plates out of the hospital; I might have copies made.

Q. You could have done that?

A. Possibly.

493 Q. Doctor Pond, you made up your mind when he was there first that he had a contusion of the abdomen, didn't you?

A. I knew that.

Q. You also stated that he had an intestinal paralysis, you learned that?

A. I did not know that, I was suspicious of that, that would be a natural consequence after suffering a blow on the abdomen.

494 Q. And that was when he was there the first time?

A. No, sir, my suspicions were aroused the first time that he might have had some structural damage to the bony parts of his body.

Q. Did he vomit when he was there?

A. Not in the hospital when I knew of it.

Q. You knew he had vomited before he got there that first time?

A. I knew he had in the caboose.

495 Q. The first time?

A. Yes.

Q. Would that be an indication that he might have a contusion of the abdomen?

A. Why, you may be talking about a contusion—

Q. I ask you if after vomiting, and knowing he had received an injury, would that be no indication that he had received a contusion of the abomen?

A. It might be.

Q. Would it be any evidence of intestinal par-
496 alysis?

A. It might be.

Q. But you took no X-ray of his abdomen for the purpose of showing whether there was any injury other than to the bone the first time, did you?

A. I ordered the customary X-ray examination of the lower chest and abdomen.

Q. But you took no X-ray for the purpose of showing the abdomen?

A. I didn't take any X-ray of the abdomen.

497 Q. And you didn't order any X-ray examination of the abdomen?

A. I ordered an X-ray of the lower chest and abdomen.

Q. Did you order an X-ray of the abdomen for the purpose of showing from an X-ray of the abdomen the condition of the abdomen, aside from any broken bones, the first time?

A. I ordered an X-ray of the lower chest and abdomen, to determine whatever the X-ray might
498 show me.

Q. Did you have an X-ray taken of the abdomen for the purpose of showing the condition of the abdomen apart from any broken bones, when he was there the first time?

A. No, sir.

Q. In washing the stomach out, how is that done, doctor?

A. Usually by a soft rubber tube, larger than my lead pencil, perhaps as large as that (indicating), possibly five feet long, perhaps longer. We

would hold the tongue forward, wash the mucous membrane of the throat, and then pass this tube 499
that had been immersed in cold water, pass this tube quickly into his stomach, and then we would fill this tube up with water from a pitcher until he would wave to us that he was not comfortable, and then we would cover the end of the tube and then the fluid would siphon itself out into a pail.

Q. Dr. Pond, as a physician and surgeon, is it your opinion that Mr. Ring died as a result of blood coming from the intestines becoming clotted, and that this condition was brought about by rea- 500
son of the injury he received, that is true, is it?

A. No, sir.

Q. Did the blood become clotted?

A. The blood became clotted.

Q. In the intestines?

A. No, sir.

Q. It didn't?

A. No, sir.

Q. Not in the intestines?

A. No, sir. 501

Q. Did the blood coming from the intestines become clotted?

A. The blood that is drained from the intestines by the vein became clotted, yes, sir.

Q. I will ask you if it isn't your opinion, doctor, as a physician and surgeon, that this condition of the blood coming from the intestines being clotted causing his death, was not produced by the injury he received?

A. It was produced by an injury, that is, a trauma.

Q. You knew he received that trauma on the
502 4th of October?

A. I knew he received that injury on the 4th of October.

Q. You knew of no other injury that could produce it—produce that condition?

A. I do not.

Q. Not knowing of any other injury that could produce that condition, I will ask you as a physician and surgeon if it isn't your opinion that the injury which he did receive, which you found that
503 he had received, was what produced his death?

A. In my opinion, yes.

RE-DIRECT EXAMINATION.

By Mr. Briggs:

Q. When Ring came there the first time what did he say, if anything, about going home the day after he came?

A. He wanted to go home the next morning.

Q. What did he say as to his condition?

504 A. I don't recall that he said anything about it, he wanted to go, and I told him that I thought he better stay there that day, I wanted to keep him under observation for a little while.

Q. And he stayed because you wanted him to?

Mr. Davis: Objected to as suggestive and argumentative.

Mr. Briggs: Question withdrawn.

Recess till 2 p. m.

Mr. Briggs: Defendant rests.

Mr. Davis: Plaintiff rests.

Mr. Briggs: Defendant makes a motion that the court direct the jury to return a verdict in favor of the defendant on the ground that no cause of action has been proven, that the defective condition of the car was not the proximate cause of the injury and that defendant was not using, hauling or permitting to be used or hauled on its line a defective car at the time of the accident. And that the negligence of the deceased in being between the cars without first notifying the engine crew or head brakeman was the cause of the accident. 505 506

Court: Motion denied.

Mr. Briggs: Exception.

Mr. Briggs argued the case to the jury on behalf of the defendant and Mr. Davis on behalf of the plaintiff.

CHARGE OF THE COURT.

Gentlemen of the Jury:

You have been chosen as a jury to try this case and determine the facts. As a jury it is your exclusive duty to determine the facts. It is for you to say what the facts are, and it is for you to weigh the evidence and to say what the evidence weighs. It is for you to determine the credibility of every witness; you have a right and it is your duty to take into consideration the manner in which witnesses give their testimony, the interest, if they have any, in the outcome of the case, and whether or not that interest has colored or warped 507

their testimony; the opportunities they have of
508 knowing the subject about which they are testifying, and to use your common sense and reason as men of common sense and reason and determine the questions of fact as submitted to you and to take the law as given you by the court.

This is an action brought by A. D. Schendel as special administrator of the estate of Edmund Ludwig Ring, deceased, as plaintiff, against the Chicago & Great Western Railroad Company as defendant, to recover damages for the death of
509 Edmund Ludwig Ring while in the employ of the defendant as a brakeman on its line of railroad near the village of Budd, Iowa. The action is brought by A. D. Schendel in his capacity as administrator for the benefit of the surviving widow and minor child of Edmund Ludwig Ring. Plaintiff bases his right of recovery in this case on two laws of Congress, the first of which is known as the Employers' Liability Law. This law provides that every common carrier, that is, a railroad, en-
510 gaged in interstate commerce, or a railroad engaged in trade or commerce between the several states, shall be liable to any of its employees also engaged in interstate commerce, or in the case of the death of such employee, to his personal representative for the benefit of his widow and children, for all damages which result in whole or in part through the negligence or fault of the officers, agents or employees of said common carrier, or by reason of any defect due to its negligence in its cars, appliances, machinery, and so forth.

The plaintiff further claims that the defendant in this case was guilty of violating a certain other 511
law or statute of Congress, known as An Act to promote the Safety of Employees and Travelers upon Railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, their locomotives with driving wheel brakes, and for other purposes. Under the terms of this Act Congress provided that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car 512
used in moving any such traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." These two statutes or acts of Congress to which I have referred, with the amendments thereto, are applicable to the facts in this case, as will be explained to you.

Now, gentlemen, I want to draw your attention to just one or two matters that apply, one is that 513
the fact that the car which was defective or had a defective coupler did not belong to this particular railroad wouldn't be material. I believe that it was an Illinois Central car; and that it, the railroad company, is made negligent as a matter of law in having a defective coupler; also the fact that they were going to move the train on the sidetrack wouldn't be material at this time, or when this accident occurred.

Before you come to the disputed questions of

fact in this case it may be well to point out the
514 facts which are conceded and undisputed. It is undisputed that the plaintiff, A. D. Schendel, is the special administrator of the estate of Edmund Ludwig Ring, deceased, and as such brings this action in behalf of the surviving widow and child of said Edmund Ludwig Ring. It is undisputed that at the time of the accident both Edmund Ring and the defendant railroad company were engaged and working in interstate commerce. It is not disputed that the deceased, Edmund Ludwig Ring,
515 was the sole support of the surviving widow and child; it is not disputed that at the time of the injury to Ring defendant was moving and hauling a certain car the coupler and draw-bar of which was defective.

Plaintiff claims that the defective condition of the coupler and draw-bar in question caused the death of decedent, and that this defect contributed in whole or in part as a proximate cause to the death of the decedent Ring. In other words,
516 gentlemen, the claim of the plaintiff is that the defective coupler and draw-bar was the cause of the death of the brakeman, Edmund Ludwig Ring. Plaintiff further claims that because of the death of Edmund Ring the widow and child of decedent have been deprived of their support and maintenance, and that they have been damaged in the sum of $35,000, as alleged in the complaint.

On the other hand, the defendant claims that the condition of the coupler and draw-bar in question, although it was defective, was not the proxi-

mate cause of the death of Edmund Ludwig Ring,
but that his death was caused by reason of his own 517
act or acts, and that he assumed the risk of the
injury which resulted in his death.

Decedent and the defendant railroad company having been engaged in interstate commerce, the first question for you to determine in this case is whether or not the coupler apparatus was proper and efficient under the law. You have heard the evidence as to that question. If you find that this coupler and draw-bar was in fact defective, then the question for you to determine is whether or 518
not this defect contributed in whole or in part as a proximate cause to the injury and death of Edmund Ludwig Ring.

Under the acts of Congress to which I have referred, it is the absolute and unqualified duty of defendant to equip and maintain its cars with proper and efficient couplers and draw-bars,—automatic couplers that can be coupled without the necessity of men going between the ends of the cars. That duty is an unconditional duty, and the 519
burden was on the defendant to keep the coupling appliances of the car in question in workable and operative condition, so that men having occasion as their duty may have required them, to uncouple cars, would not have to go between the ends of the cars for the purpose of performing that act.

If you find that the coupling appliance on this car, which plaintiff was to uncouple, as disclosed by the evidence in this case, was in fact defective and inoperative, then it will be your duty to determine whether or not the said defect was the proxi-

mate cause of the injury to decedent. Unless the
520 defective condition of the coupling was the proxi-
mate cause of the injury to decedent, the plaintiff
cannot recover. In determining this question you
are to take into account all the evidence in the
case and all the facts and circumstances bearing
on the duties of the decedent and the work to be
done by him at the time of the accident. Did
Edmund Ludwig Ring in the discharge of his
duties go between the ends of the cars for the pur-
pose of uncoupling or separating this car from the
521 other cars and was he injured while doing so, with
resulting death? If you find that because of the
defect deceased did go between the ends of the cars
and did attempt to make the uncoupling, then you
would determine whether or not the defect was
the proximate cause of defendant's injury and
death.

Proximate cause of an injury is that which
causes it directly or immediately, or through a
natural sequence of events, without the interven-
522 tion of any other independent or efficient cause.
The defective coupler may be found to be the
proximate cause of decedent's injury if it was a
direct and immediate cause without which the in-
jury would not have occurred.

If you find from the evidence that the coupler
was defective and that such defect was the proxi-
mate cause of the injury to decedent, then the
plaintiff is entitled to recover. The fact, if it be
a fact, that decedent knew that the coupler was
defective and inoperative, would not prevent recov-

ery in this case. It is alleged in the answer that decedent assumed the risk of his injury. If you 523
find that the coupling apparatus was defective and that defect caused the death of Edmund Ring while he was endeavoring to uncouple this car in the performance of his duty, then the plea of assumption of risk is unavailing to the defendant, and the fact that plaintiff may have known that it was defective would not prevent recovery. Moreover, under the law which I have given you, you cannot consider for any purpose the question of whether or not decedent was himself careless or 524
guilty of contributory negligence. Even if you should find that he was careless and that some act of his contributed to his injury this would not prevent recovery under the laws to which I have referred unless you should find from the evidence that the decedent's act or acts constituted the sole cause of the injury, and that defendant's act in moving or hauling the defective car was no part of the causation.

The burden is upon the plaintiff to prove by a 525
fair preponderance of evidence that the coupler was defective, and that defect was the proximate cause of the injury to Edmund Ludwig Ring. If you find the evidence evenly balanced or that it preponderates in favor of the defendant, then you will find for the defendant. If you find that plaintiff does establish this by a fair preponderance of evidence, you will find for the plaintiff.

If by the rules as I have given them to you you reach the conclusion that plaintiff is entitled to

recover, the next question for you to determine
526 is the amount of damages to be allowed to the plaintiff. Under the law, if in this case plaintiff is entitled to recover, then plaintiff is entitled to recover such damages as you believe from the evidence will fairly and reasonably compensate the surviving widow and child for the actual monetary loss they have sustained. In arriving at that sum you have a right to take into consideration the earning capacity of the decedent and the amount he contributed to such widow and child for their
527 support, care and maintenance. You should first determine what amount he did so contribute; you will then determine from all the testimony about how long such contribution would have continued. Evidence has been introduced in this case to show the normal expectancy of the life of a person 28 years old. This evidence should be considered by you in determining the question, but it isn't necessarily conclusive. A person might live long beyond the period of his normal expectancy or he
528 might die long before such time. It is for you to determine from the evidence the length of time that the decedent would have lived and contributed to the support of the surviving widow and child.

When you have determined that, and you have determined the amount of the annual contribution of the decedent to his widow and child, you will reduce these contributions to their present value. The present value is such sum which if put out at interest at a fair rate would produce for the period of the expectancy the amount of his contribution annually, and with the last payment both the prin-

cipal sum and the interest will be exhausted. In other words, if for example the contribution were one dollar a year for a period of ten years, the jury would find what sum if put out at a reasonable rate of interest would produce one dollar a year for ten years and with the last payment both the principal sums and the interest would be exhausted. 529

Evidence has been introduced in this case showing the present worth of one dollar per year for different periods. This evidence may be considered by you in arriving at the present rate of contribution of decedent, if you come to the question of the damages to be awarded in this case. In considering the question of damages you may take into consideration the evidence which has been introduced upon this question; you are to determine from the evidence what is a reasonable rate of interest as a return for money safely invested. 530

After you determine these questions you are to reduce the amount of the annual contributions to its present value under the rules as I have given them to you, and this sum should represent your verdict in this case, if you find in favor of the plaintiff. Now, in regard to the tables that were introduced, that is, the mortality tables and the table as to the present value of a dollar, and so forth, I wish to say that the so-called mortality tables as well as the tables showing the present value of a dollar have been offered in evidence in this case. These are not conclusive or binding on you, but are for your consideration in case you should find for the plaintiff. 531

In finding the amount to which plaintiff is en-
532 titled to recover, you should in this case as in all others use your best judgment, based on your experience, and render a verdict of such an amount as will compensate the plaintiff for the financial loss and suffering no more and no less.

Plaintiff also claims damages for the pain and suffering of decedent between the time of the injury and his death. I shall not refer or comment upon the evidence in this case as to what this pain and suffering may have been. You have heard the
533 evidence here by the witnesses upon the question of this pain and suffering, and it is for you to determine from all the evidence to what extent decedent suffered as a result of this injury. You are at liberty to take into consideration the pain and suffering endured by decedent that you so find, and award such damages as you may think proper and right, not to exceed the sum of $15,000 as alleged in the complaint.

You are to fairly and impartially weigh and con-
534 sider all the testimony and all the facts and circumstances testified to upon the trial and return a verdict in accordance with the facts as you shall find them and the law as given you by the court. When you retire to your jury-room select one of your number as foreman, and when you have agreed upon your verdict notify the bailiff and he will conduct you back into the court-room.

Court: Are there any suggestions, counsel?

Mr. Davis: I would ask the court to charge the jury that if they in fact had a defective coupler,

that if a rule was violated it was no defense and cannot be considered by the jury. The rules was 535
introduced in evidence and goes to the jury, and for that reason plaintiff would ask the court to charge the jury that if they find that defendant had a defective coupler and that that was the proximate cause of the injury, that they cannot consider the violation of any rule introduced, as that was no defense in this case under the circumstances.

Mr. Briggs: Will the Court require the jury to separate the two findings of pain and contribution 536
and bring in separate amounts, to indicate what their findings are?

Mr. Davis: It is agreeable to us.

Court: Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant: That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules. In 537
other words, that acts of the plaintiff are no defense unless the act was the sole cause of the injury.

Mr. Briggs: Will the court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective draw-bar was the proximate cause of the accident?

Cout: I don't believe that is the law as laid down by our Supreme Court.

Mr. Briggs: The court understands that our
538 contention is that the defective draw-bar was not the proximate cause of the accident, and therefore that this rule should be taken into consideration of what that proximate cause was.

Court: Forms of verdict will be supplied you, one in which you will find for the plaintiff, and the other in which you will find for the defendant. If you find for the plaintiff you will insert as damages, if you find damages on both points that have been asked, you will divide your verdict, so that
539 if you find damages for the contribution that she would receive, put that down to damages for the contribution, and if you find damages for pain and suffering, put down the amount you find and write after it, "for pain and suffering." Thus we will be able to determine what the amount of each is that you arrive at.

Our statute provides that in cases of this kind a five-sixths jury may render a verdict, that is, 10 out of the 12 under certain conditions. I will
540 simply read the statute to you:

"In all civil actions or proceedings in any court of record of this state after twelve hours' deliberation the agreement of five-sixths of any jury therein shall be sufficient and valid verdict. The deliberation of the jury shall be deemed to have commenced when the officer taking charge of the jury has been sworn. Where the verdict is agreed to by the full membership of the jury, the foreman only shall sign the verdict; when less than the full number agree on a verdict the same shall be signed

by all the jurors who concur therein." If you have only the one signature of the foreman, will you 541
be careful that he signs his name over the word "Foreman," or write the name "Foreman" under your name.

Whereupon the jury retired for deliberation.

Mr. Briggs: Counsel (Mr. Davis) in his argument said that that item alone entitles her to $10,000 for pain and suffering, or words substantially like that. And then he again used the language, "according to the evidence which I believe makes $10,000 for pain and suffering." I except to 542
those two remarks.

Mr. Davis: We object to the exception now; no exception was taken at the time the argument was made, or the matter called to the attention of the court or counsel for plaintiff, and no exception was taken at that time.

VERDICT. 543

After due deliberation the jury returned a verdict for the plaintiff and assessed the damages at $25,000, of which $5,000 was for pain and suffering, and $20,000 for contribution.

A stay of 50 days was ordered by consent of parties.

544 EXHIBITS.

Plaintiff's Exhibit A was a photograph, withdrawn, not introduced. Exhibit B is a photograph of deceased.

DEFENDANT'S EXHIBITS.

Defendant's Exhibits 1 to 25 are 25-pay-checks of deceased E. L. Ring, dated approximately every
545 two weeks from October 15, 1921, to October 16, 1923, and are, in their order, of the following amounts:

$94.39	$32.30
82.12	62.27
84.22	91.97
57.03	77.73
80.46	74.59
80.77	92.38
84.45	69.22
546 94.98	38.93
51.56	49.28
81.18	86.82
98.96	84.45
96.54	103.53
	28.27
$986.66	$891.74

Defendant's Exhibit 26 is the Book of Rules, and 547
the two sections introduced in evidence are No. 707, read into the record on page 64 of this transcript, and No. 703, on page 67.

(Title of Cause)

NOTICE OF PROPOSED SETTLED CASE.

548

Please take notice, that the above named defendant, Chicago Great Western Railroad Company, proposes the attached transcript as and for the settled case in this action.

BRIGGS, WEYL & BRIGGS,
Attorneys for Defendant,
915 Merchants Bank Bldg.,
Saint Paul, Minnesota.

To Davis & Michel, Minneapolis, Minn., Attorneys for Plaintiff.

549

Due and personal service of foregoing notice and attached transcript by receipt of a copy thereof, is hereby admitted at Minneapolis, Minnesota, this .....day of July, 1923.

DAVIS & MICHEL,
Attoneys for Plaintiff.

(Title of Cause.)

550

STIPULATION SETTLING CASE.

It is stipulated by and between the parties to the above entitled action that the foregoing proposed case may be signed, settled and allowed as a settled case in said action and that the same contains all of the evidence received upon the trial of said cause, all offers of testimony, objections, rulings and exceptions, charge of the Court and verdict and the Court is requested to allow the same as

551 the settled case herein.

It is further stipulated and agreed that all original exhibits offered and received in evidence may be used and referred to by either party and by the Court, the same as if fully set out in the settled case and in the event of appeal to the Supreme Court, such original exhibits shall be handed to the Clerk of District Court by the party in whose possession they are in order that they may be returned by said Clerk to the Supreme Court for use

552 therein, the same as if fully set forth in said settled case.

It is further stipulated and agreed that the stay hereinbefore entered in this action may be extended to September 1, 1923.

Dated August ....., 1923.

DAVIS & MICHEL,
Attoneys for Plaintiff.
BRIGGS, WEYL & BRIGGS,
Attorneys for Defendant.

(Title of Cause.) 553

ORDER SETTLING CASE.

The foregoing having been examined by the undersigned, the Judge before whom said cause was tried, and the same having been found to be true and to contain all of the evidence received and all offers of testimony, motions, requests, objections, rulings, exceptions, charge of the Court and verdict of the jury, and the same being conformable to the truth, it is allowed as a settled case herein. 554

Dated August ....., 1923.

HAROLD BAKER,
District Judge.

(Title of Cause.)

ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR FOR NEW TRIAL.

To Davis & Michel, Esqs., Attorneys for Plaintiff, 555
Minneapolis, Minnesota.

Sir:

You will please take notice, that at the office of Hon. Harold Baker, Judge of the District Court in and for the County of Yellow Medicine, State of Minnesota, in the City of Renville in said State, on the 19th day of September, 1923, at 2 o'clock P. M. or as soon thereafter as counsel can be heard, a motion will be made on behalf of the defendant

in the above entitled action for an Order for Judg-
556 ment in favor of defendant and against the plaintiff, notwithstanding the verdict; and if such Order for Judgment shall not be granted, then in that case that an order be made granting a new trial in said action.

Said motion will be based upon the pleadings, files, settled case, exhibits and proceedings had herein, and will be made on the following grounds:

1. Said verdict is not justified by the evidence and is contrary to law.

557

2. That the Court erred in denying the motion of the defendant that a verdict be directed in its favor at the conclusion of the testimony.

3. The Court erred in charging the jury as follows and defendant excepts thereto, viz:

"The railroad company, is made negligent as a matter of law in having a defective coupler; also, the fact that they were going to move the same on the track wouldn't be material at this time, or when this accident occurred."

558 Page 132 of Transcript.

4. The Court erred in charging the jury as follows, and defendant excepts thereto, viz:

"It is not disputed that at the time of the injury to Ring, defendant was moving and hauling a certain car, the coupler and drawbar of which was defective." Page 132 of Transcript.

5. The Court erred in charging the jury as follows, and defendant excepts thereto, viz:

"If you find that this coupler and drawbar

was in fact defective, then the question for you to determine is whether or not this defect contributed in whole or in part as a proximate cause to the injury and death of Edmund Ludwig Ring." Page 133 of Transcript. 559

6. The Court erred in charging the jury as follows, and defendant excepts thereto, viz:

"If you find that because of the defect deceased did go between the ends of the cars and did attempt to make the uncoupling, then you would determine whether or not the defect was the proximate cause of decedent's injury and death." Page 134, at bottom of page. 560

7. The Court erred in charging the jury as follows, and defendant excepts thereto, viz:

"If you find from the evidence that the coupler was defective and that such defect was the proximate cause of the injury to decedent, then the plaintiff is entitled to recover." Page 135.

8. The Court erred in charging the jury as follows, and defendant excepts thereto, viz:

"Moreover, under the law which I have given you, you cannot consider for any purpose the question of whether or not decedent was himself careless or guilty of contributory negligence. Even if you should find that he was careless and that some act of his contributed to his injury this would not prevent recovery under the laws to which I have referred unless you should find from the evidence that the decedent's act or acts constituted the sole cause of the injury, and that defendant's act in moving or hauling the defective car was no part of the causation." Page 135, at bottom of page. 561

9. The Court erred in charging the jury as fol-
562 lows, and defendant excepts thereto, viz:

"Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules." Page 139 at bottom of page, and Page 140, at top of page.

563 10. The Court erred in refusing defendant's requested instructions as follows, and defendant excepts thereto, viz:

Mr. Briggs: Will the Court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective drawbar was the proximate cause of the accident?

Court: I don't believe that is the law as laid down by our Supreme Court.

564 11. The Court erred in charging the jury as follows:

"If by the rules as I have given them to you you reach the conclusion that plaintiff is entitled to recover, the next question for you to determine is the amount of damages to be allowed to the plaintiff. Under the law, if in this case plaintiff is entitled to recover, then plaintiff is entitled to recover such damages as you believe from the evidence will fairly and reasonably compensate the surviving widow and child for the actual monetary loss they

have sustained. In arriving at that sum you have a right to take into consideration the earning capacity of the decedent and the amount he contributed to such widow and child for their support, care and maintenance. You should first determine what amount he did so contribute; you will then determine from all the testimony about how long such contribution would have continued. Evidence has been introduced in this case to show the normal expectancy of the life of a person 28 years old. This evidence should be considered by you in determining the question, but it isn't necessarily conclusive. A person might live long beyond the period of his normal expectancy or he might die long before such time. It is for you to determine from the evidence the length of time that the decedent would have lived and contributed to the support of the surviving widow and child. 565 566

When you have determined that, and you have determined the amount of the annual contribution of the decedent to his widow and child, you will reduce these contributions to their present value. The present value is such sum which if put at interest at a fair rate would produce for the period of the expectancy the amount of his contribution annually, and with the last payment both the principal sum and the interest will be exhausted. In other words, if for example the contribution were one dollar a year for a period of ten years, the jury would find what sum if put out at a reasonable rate of interest would produce one dollar a year for ten years and with the last payment both the principal sum and the interest would be exhausted. 567

Evidence has been introduced in this case
568 showing the present worth of one dollar per year for different periods. This evidence may be considered by you in arriving at the present rate of contribution of decedent, if you come to the question of the damages to be awarded in this case. In considering the question of damages you may take into consideration the evidence which has been introduced upon this question; you are to determine from the evidence what is a reasonable rate of interest as a return for money safely invested.

After you determine these questions you are
569 to reduce the amount of the annual contributions to its present value under the rules as I have given them to you, and this sum should represent your verdict in this case, if you find in favor of the plaintiff. Now, in regard to the tables that were introduced, that is, the mortality tables and the table as to the present value of a dollar, and so forth, I wish to say that the so-called mortality tables as well as the tables showing the present value of a dollar have been offered in evidence in this
570 case. These are not conclusive or binding on you, but are for your consideration in case you should find for the plaintiff.

In finding the amount to which plaintiff is entitled to recover, you should in this case as in all others use your best judgment, based on your experience, and render a verdict of such an amount as will compensate the plaintiff for the financial loss and suffering, no more and no less.

Plaintiff also claims damages for the pain and suffering of decedent between the time

of the injury and his death. I shall not refer or comment upon the evidence in this case as to what this pain and suffering may have been. You have heard the evidence here by the witnesses upon the question of this pain and suffering, and it is for you to determine from all the evidence to what extent decedent suffered as a result of this injury. You are at liberty to take into consideration the pain and suffering endured that you so find, and award such damages as you may think proper and right, not to exceed the sum of $15,000 as alleged in the complaint." 571

572

Defendant excepts thereto on the ground that the instruction was misleading and prejudicial to defendant in that the jury was not instructed to take into consideration the issue of contributory negligence in mitigation of damages, and that the Court thereby erroneously charged on the issue of damages.

12. That the damages are excessive, appearing to have been given under the influence of passion and prejudice. 573

BRIGGS, WEYL & BRIGGS,
Attoneys for Defendant,
915 Merchants Bank Bldg.,
Saint Paul, Minnesota.

(Title of Cause.)

574

ORDER DENYING MOTION.

The above entitled matter came on to be heard on the 19th day of September, 1923, on motion of the attorneys for the defendant for an order for judgment in favor of defendant and against the plaintiff, notwithstanding the verdict and if such order for judgment shall not be granted, then in that case that an order be made granting a new trial in said action, said Motions being based upon
575 the pleadings, files, settled case, exhibits and proceedings had herein:

Messrs. Briggs, Weyl & Briggs appearing for defendant and Messrs. Davis & Michel appearing for plaintiff;

The Court having heard the arguments of counsel and being fully advised in the premises and from the files and records herein, is impeled to the conclusion that defendant's Motions should be denied, Now therefore;

576 It is Hereby Ordered, That defendant's motion for an order for judgment in favor of defendant and against the plaintiff, notwithstanding the verdict; and if such order for judgment shall not be granted, then in that case that an order be made granting a new trial in said action, be and the same hereby is in all things denied.

Dated at Renville, Minnesota, this 15th day of October 1923.

HAROLD BAKER,
Judge.

577

(Title of Cause.)

NOTICE OF APPEAL.

To Davis & Michel, attorneys for the above named plaintiff, and to Alvin Landru, Clerk of said District Court:

Please Take Notice, That the above named defendant appeals to the Supreme Court of the State of Minnesota, from the Order of the said District Court entered herein, on the 15th day of October A. D. 1923, denying defendant's motion for judgment notwithstanding the verdict, or for a new trial and from the whole thereof. 578

Dated this 30th day of October A. D. 1923.

BRIGGS, WEYL & BRIGGS,

Attorneys for Defendant.

579

580 (Title of Cause.)

UNDERTAKING.

Whereas, The above entitled action duly came on for hearing before the above named court on motion of the defendant for judgment notwithstanding the verdict, or for new trial, and

Whereas, The said court duly over-ruled said motion by its order, and

Whereas, Defendant has served Notice of Appeal
581 from said order,

Now, Therefore, The National Surety Company does hereby undertake, promise and agree to and with plaintiff that said defendant shall well and truly prosecute said appeal with effect and that it will pay all costs and damages that may be sustained by the plaintiff by reason of this appeal, not to exceed, however the sum of Thirty Thousand Dollars, ($30,000.00).

In Witness Whereof, the National Surety Com-
582 pany has caused this instrument to be executed this day of October, 1923.

NATIONAL SURETY COMPANY,

By L. A. GREEN,

Its Attorney-in-fact.

In Presence of:

G. E. Johnson.

M. Frederickson.

583

STATE OF MINNESOTA,

County of Ramsey, ss.

On this 30th day of October A. D. 1923, before me appeared L. A. Green, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of 584
said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said L. A. Green, acknowledged said instrument to be free act and deed of said corporation.

G. E. JOHNSON,

(Notarial Seal) Notary Public,

Ramsey County, Minnesota.

My Commission Expires Sept. 20, 1924.

585

586

PROCEEDINGS IN SUPREME COURT.

Printed record filed Jan. 5, 1924.

Appellant's brief filed Jan. 5, 1924.

Respondent's brief filed Jan. 21, 1924.

Cause argued by counsel and submitted March 19, 1924.

April 17, 1924, opinion and syllabus filed, Wilson, C. J., as follows:

587

SYLLABUS.

An interstate train in the act of taking a siding to meet a train, separated because a draw-bar pulled out. A chain coupling was made to get the train off the main line. The decedent, a brakeman, with the conductor, undertook to unhook the chain to uncouple the train from the defective car. The head brakeman uncoupled the engine and the train was caused to move backward. He then caused the brakes to be applied on the cars ahead
588 of the defective car. When the train moved backward decedent locked his arms about the axles of the defective car and swung his body over the chain and when the front part of the train stopped, the chain became taut and squeezed decedent's body against the car above him causing injuries from which he died fifteen days later. Verdict for $5,000 for pain and suffering and $20,000 for loss from death. Held:

(1) That there was no break in the chain of events between the pulling out of the draw-bar and the injury and that the facts bring the case within the provisions of the Safety Appliance Act. 589

(2) a. The defective draw-bar was a proximate cause of the injury.

b. In a case based upon Federal Safety Appliance Act it is not necessary to prove negligence. A disregard of the statute is a wrongful act, and where it results in damage to one of the class for whose benefit the statute was enacted, the right to recover the damages from the party in default, is implied. 590

(3) a. Contributory negligence not a defense.

b. Whether a violation of rules, which were in evidence, was the proximate cause of decedent's injury, was sufficiently covered by a general charge, and defendant was not entitled to a specific charge in reference thereto.

c. Before a violation of rules could avail defendant any aid it would have to constitute the sole proximate cause of the injury. 591

Various assignments of error as to the charge to the jury without merit.

Damages not excessive.

592 OPINION.

This is an action to recover damages for pain and suffering and also damages for the death of one Ring, who was employed by defendant as a brakeman, at the time he sustained injuries from which he died. The deceased was working on an interstate train which, on arriving at Budd, Iowa, undertook to take a siding and meet an east-bound train. The switch was thrown and in starting the train to pass on to the sidetrack a draw-bar pulled
593 out, permitting the train to separate. The crew consisted of the conductor, decedent, another brakeman and the engine men. The train was backed up to the cars which had broken loose. The front car of the portion of the train which had broken loose was coupled with a chain hooked on its front axles with the car ahead so as to pull the rear part of the train off of the main line onto the siding. Decedent under direction of the conductor aided in this work. The train was pulled onto the
594 sidetrack and brought to a stand still. The plan was to switch the defective car out of the train. This was in the night time. The conductor asked decedent if he could unhook the chain and he replied that he did not know, but, set his lantern down, and, tried and replied that he could not do it. Then the conductor tried it. The chain was heavy and one man could not handle it. Decedent got on the other side of the chain and reached down to lift up the chain to give the slack to the

conductor so he could unhook the chain. The brakeman Quist uncoupled the engine from the 595
train for the purpose of permitting it to go out on the main track and to the rear of the train so as to get that part of the train back of the defective car and when this uncoupling was made the disconnected portion having the air brakes released and perhaps started by the movement of the engine, moved back, but Quist caused the air to be applied and thereby stopped the movement. The train backed up without warning and the conductor straightened up and walked back with the 596
movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and he swung his body up over the chain, apparently to ride thereon in the brief movement of the train, and the slack ran back—by the head cars stopping—and as the chain was pulled straight, it squeezed the body of decedent between the chain, then under him, and the bottom of the draft timbers of the car above 597
him. This so injured decedent that he suffered severe pain until his death, fifteen days later.

This action was brought by the administrator of decedent's estate to recover for the benefit of the widow and child of decedent. A verdict was rendered for $25,000, of which $5,000 was for pain and suffering, and $20,000 for loss from death. Defendant has appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The defendant claims that the facts do not bring
598 the case within the safety appliance act; that the defective draw-bar did not proximately contribute to the injury; that the question of decedent's violation of rules should have been submitted to the jury; that errors occurred in the charge to the jury; and that damages are excesive.

1. Do the facts bring this case within the provisions of the Safety Appliance Act? The defendant asserts that nothing happened while this car was chained up and hauled on to the side track,
599 and that it there came to rest, and that it at that instant ceased to be "used" by the carrier. It attempts to put this defective car in the status of the car in McCalmont v. Penn. Ry., 273 Fed. 231, affirmed 283 Fed. 736, wherein a car was placed on a dead track where an employee was later injured. In this case the defective car was not yet placed to be left and in fact the equipment, the chain, used to replace the defective coupling, was still intact and the car remained in the train of
600 which it was a part. There was here no break in the chain of events between the pulling out of the draw-bar and the injury. Defendant argues that on the theory of the plaintiff, if the defendant would haul the car, it would violate the act, and if it did not haul it, it violated the act. Such is not the case. If defendant hauled the car in use, knowing it was defective, it would be subject to a penalty. It had the right, however, to haul the car to a repair track without incurring a penalty, but such movement should, notwithstanding, be at

the sole risk of the carrier. Clearly the facts bring this case within the Safety Appliance Act. Otos 601
v. Great Northern Ry. Co., 128 Minn. 283; 150 N. W. 922; 239 U. S. 349; San Antonio & A. P R. Co. v. Wagner, 241 U. S. 476; Goneau v. M. St. P. & S. S. M. Ry. Co., ... Minn. ....., 191 N W. 279; Frye v. C. R. I. & P. Ry. Co., ... Minn. ....., 195 N. W. 629.

2. That the defective draw-bar did proximately contribute to the injury is clearly established. As above indicated, the unbroken chain of events, from the moment the car became defective until 602
the accident happened; the circumstances, the character of the injury, and the happening thereof, all lead to the irrepressible conclusion that the defective draw-bar was a proximate cause of the injury.

The jury necessarily found, under the instructions of the court, that the defect was the proximate cause of the injury. This conclusion is inevitable as that was a condition of plaintiff's right to recover. 603

Defendant says that there is no proof of negligence. In a case based upon the Federal Safety Appliance Act it is not necessary to prove negligence. A disregard of the statute is a wrongful act, and where it results in damage to one of the class for whose benefit the statute was enacted, the right to recover the damages from the party in default is implied. The question of negligence in the general sense of want of care is immaterial. The violation of the statute is to be treated as neg-

ligence. San Antonio & A. Pass. Ry. Co. v. Wag-
604 ner, 241 U. S. 476; Texas & Pac. Ry. Co. v. Rigsby, 241 U. S. 43.

3. It is urged that the courts should have given specific instructions as to rules of the defendant as touching upon the question of proximate cause. These rules are in evidence and are as follows:

> "No. 707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essen-
> 605 tial to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."
>
> "No. 763. Persons accepting service will be deemed to have full knowledge of the dangers and risks incident to the service. They agree to exercise due care in the performance of their duties to prevent accident to themselves
> 606 or others, and, before using them, to see that the machinery, tools, appliances and materials are in a safe condition to perform the service required."

If decedent violated the rules and in that respect was guilty of negligence, himself, which contributed to the injury, that fact would not bar a recovery. Sec. 3, Act of April 22, 1908, 35 Stat. at L. p. 65, ch. 149; Fletcher v. S. D. Cent. Ry. Co., 155 N. W. 3; Grand Trunk v. Lindsay, 233 U. S. 42. Defendant, however, claims that the violation of

the rules by decedent was so flagrant as to constitute the proximate cause of the injury. It is 607
claimed that the defective car furnished the occasion for the act of decedent and that his act was the cause of the injury without the first act, having the defective car, in any manner being a contributing cause of the injury. An effort is made to put this case in the class with G. N. Ry. Co. v. Wiles, 240 U. S. 444. Wiles v. G. N. Ry. Co., 125 Minn. 348. They are not alike. The Wiles case does not control this case; but the Otos case is more persuasive. 608

The rules being in evidence, the defendant had a perfect right to argue to the jury, as it doubtless did, its present claim of the decedent being guilty of such conduct as to constitute the proximate cause and under the general charge the jury would necessarily consider the facts and circumstances upon which defendant sought specific instructions. Such instructions are not to be encouraged when so well covered by the general charge. Watson v. Mpls. St. Ry. Co., 53 Minn. 557. Before this con- 609
duct on the part of decedent could avail the defendant any aid, it would have to constitute the sole proximate cause of the injury. The evidence is not such as to lead us to the conclusion that there was any chance for error in reference to the elements here under consideration.

The assignment of error number ten in this case relative to instructions as to the violation of the rules, is much the same as assignment of error

number fifteen in the Otos case wherein and in
610 reference to which this court said:

"Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employees going between moving cars. It appears that there was such a rule. There is evidence that in this yard, it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only
611 one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. Turrittin v. Chicago, etc., 95 Minn. 408; 104 N. W. 225; Sprague v. Wisconsin, 104 Minn. 58; 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence 'would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negli-
612 gence. * * * It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act.' Grand Trunk v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914 C, 168, quoting 201 Fed. 844, 120 C. C. A. 166."

After this draw pulled out there was not any new intervening cause of itself sufficient to stand as the cause of the injury. If there was such, then the original act, the defective car, would be too remote. The defendant's claim that the violation

of the rules would be such, cannot be sustained and the court was right in not specifically charg- 613
ing the jury in reference to a violation of the rules. The general charge precluded a recovery by plaintiff unless the defective car was the proximate cause of the injury, and this was all to which defendant was entitled.

4. We have carefully considered the various assignments of error as to the charge to the jury but do not find that any of them are of substantial merit.

5. Was the damages excessive? Defendant in- 614
vokes the case of Nash v. M. & St. L. Ry., 131 Minn. 167, and the plaintiff cites Clark v. Davis, 153 Minn. 143 and St. Louis I. M. & So. R. Co. vs. Craft, 237 U. S. 648. Upon a consideration of the evidence in this case, and the authorities applicable we approve the verdict.

Order affirmed.

615

April 21st, 1924, costs taxed and judgment entered therefor as follows:

Statutory costs,	$25.00
Printing brief,	16.50
	$41.50

April 30th, 1924, Remittitur made.

MANDATE.

616

STATE OF MINNESOTA,

Supreme Court. ss.

The State of Minnesota to the Honorable Judge and Officers of the District Court within and for the County of Yellow Medicine, Greetings:

Whereas, lately in your Court, in an action therein pending, entitled A. D. Schendel, as Special Administrator of the Estate of Edmund L. Ring, deceased, plaintiff, and Chicago Great Western Railroad, defendant, a certain order was entered therein Oct. 15th, 1923, from which action of your Court an appeal thereafter was taken to this Court;

617

And Whereas, the said cause came on to be heard before our Supreme Court, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things, affirmed, and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

618

Now, Therefore, this Mandate is to you directed and certified, to inform you of these proceedings had in our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith Remanded to your Court for such other or

future record and proceedings therein as may be by law necessary, just and proper, under and by 619
virtue of the said order herein made.

Witness, The Honorable Samuel B. Wilson, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this April 30th, 1924.

GRACE F. KAERCHER,
(Seal) Clerk of the Supreme Court.
By PETER O. SCOW, Deputy.

620

May 2, 1924, the following stipulation was made with regard to entry of judgment in the District Court:

(Title of Cause.)

It Is Hereby Stipulated by and between the parties to the above entitled action, that

Whereas, the order of the District Court denying defendant's motion for judgment notwith- 621
standing the verdict or in the alternative for new trial, has been affirmed by the Supreme Court of Minnesota, and

Whereas, the verdict in said action was for the sum of $25,000.00.

It Is Stipulated that the defendant shall and does hereby waive all notice of taxation of costs in the District Court in said action and all notice of the entry of judgment therein, and that the taxable costs of the plaintiff in said action amount

to $161.37, and that the interest on said verdict
622 to May 2nd, 1924, amounts to $1,286.43.

Dated this 2nd day of May, 1924.

DAVIS & MICHEL
and E. S. CARY,
Respondent's Attorneys.
BRIGGS, WEYL & BRIGGS,
Appellant's Attorneys.

May 8th, 1924, Judgment entered.

623

(Title of Cause.)

JUDGMENT, MAY 8, 1924.

This cause having been regularly placed upon the calendar of the above named court for the June, A. D. 1923, General Term thereof, came on for trial before the Court and a jury duly empanelled and sworn to try the same on the 21 day of June, A. D. 1923, which said jury did on the
624 22 day of June, A. D. 1923, duly render a verdict herein in favor of said plaintiff.

Now, pursuant to said verdict and stipulation and on motion of Davis & Michel and E. S. Cary, attorneys for plaintiff, it is hereby adjudged that the plaintiff recover of the defendant and each of them the sum of twenty-six thousand two hundred eighty-six and 43/100 dollars, the amount of said verdict, stipulation and interest to May 2, 1924, together with one hundred and one and 37/100

dollars, costs and disbursements, as taxed and allowed, amounting in all to the sum of twenty-six thousand three hundred eighty-seven and 80/100 dollars. 625

By the Court:

CHAS. J. CLARK,
Clerk of District Court.

May 9th, 1924, Notice of Appeal served and filed, and bond approved.

626

(Title of Cause.)

NOTICE OF APPEAL.

To Davis & Michel, Esqs., Attorneys for the above named plaintiff, and to Charles J. Clark, Esq., Clerk of said District Court:

Please take notice that the above named defendant, Chicago Great Western Railroad Company appeals to the Supreme Court of the State of Minnesota from the judgment of the said District Court entered herein, on the 8th day of May, A. D. 1924, in the sum of twenty-six thousand three-hundred eighty-seven dollars eighty cents ($26,387.80) in favor of plaintiff and against defendant, and from the whole thereof. 627

Dated this 9th day of May, A. D. 1924.

BRIGGS, WEYL & BRIGGS,
Attorneys for Defendant,
915 Merchants Bank Bldg.,
St. Paul, Minn.

628 (Title of Cause.)

UNDERTAKING.

Whereas, judgment in the above entitled cause was entered on the 8th day of May, 1924, in favor of plaintiff and against defendant in the sum of twenty-six thousand three hundred eighty-seven dollars eighty cents ($26,387.80), and

Whereas, said defendants have served notice of appeal from said judgment,

629 Now, therefore, the National Surety Company does hereby undertake, promise and agree to and with the plaintiff that said defendants shall well and truly prosecute said appeal with effect; that it will pay all costs, charges and damages that may be sustained by the plaintiff in consequence thereof if the said judgment or any part thereof be affirmed, and to abide and satisfy the judgment which the appellate court may direct herein, not to exceed, however, the sum of twenty-eight thou-
630 sand dollars ($28,000.00).

In Witness Whereof, the National Surety Company has caused this instrument to be executed this 9th day of May, 1924.

NATIONAL SURETY COMPANY,

By C. M. BEND, (Seal)

Its Attorney-in-Fact.

In Presence of:

G. E. Johnson,

M. Frederickson.

631

STATE OF MINNESOTA,

County of Ramsey. ss.

On this 9th day of May, A. D. 1924, before me appeared C. M. Bend, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said C. M. Bend acknowledged said instrument to be the free act and deed of said corporation.

632

G. E. JOHNSON,

(Seal) Notary Public,

Ramsey County, Minnesota.

My commission expires Sept. 28, 1924.

The foregoing surety and bond approved this 9th day of May, 1924.

633

HAROLD BAKER,

Judge.

634 May 8th, 1924, the following stipulation with regard to the appeal was made:

(Title of Cause.)

STIPULATION.

It Is Hereby Stipulated by and between the parties to the above entitled action that the appeal now pending herein in this court, same being an appeal by defendant from Final Judgment entered May 8th, 1924, in the District Court of Yellow Medicine county, Twelfth Judicial District of Minnesota, in favor of plaintiff and against defendant in the sum of $26,387.80 may be, and is hereby submitted to the Supreme Court of Minnesota for its decision, without argument, upon the printed record, briefs of the parties and other proceedings had and taken in that certain action entitled A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, Respondent, vs. Chicago Great Western Railroad Company, Appellant, numbered 23898 upon the files and records of said Supreme Court and being an appeal in this same cause from the order of said District Court of Yellow Medicine county denying defendant's alternative motion for judgment notwithstanding the verdict or a new trial.

635

636

It Is Further Stipulated that the Record of this cause need not be printed by defendant-appellant upon this appeal and that no briefs need be filed

by either party; the printing of such Record and the making and filing of such briefs being hereby 637
expressly waived.

It Is Further Stipulated that if said judgment of said District Court be affirmed, there be no remittitur to said District Court; the purpose of this Stipulation being that if said judgment be affirmed final judgment may be entered thereon in this Court; but nothing herein shall be construed as a consent by defendant to the entry of any judgment against it or as a waiver of its assignments of error in the entry of any judgment; de- 638
fendant expressly reserving and claiming the right to have all questions arising in the entry of said judgment and proceedings prior thereto reveiwed by the Federal Supreme Court if said Court shall grant a Writ of Certiorari upon defendant's petition therefor.

Dated May 8th, 1924.

DAVIS & MICHEL
and E. S. CARY,
Attorneys for Respondent. 639
BRIGGS, WEYL & BRIGGS,
Attorneys for Appellant.

640 May 20, 1924, opinion filed, per curiam, as follows:

(Title of Cause.)

PER CURIAM.

This is an appeal by the defendant from a judgment of the District Court of Yellow Medicine county, State of Minnesota, entered in favor of plaintiff and against defendant in an action
641 brought by the plaintiff, A. D. Schendel, as special administrator of the estate of Edmund Ludwig Ring, deceased, to recover damages because of pain suffered by decedent, from the injuries complained of, before his death, and because of damages and loss suffered because of the death of the decedent resulting from such injuries. The action is based upon two acts of Congress, one known as the Employees' Liability Law and the other known as the Federal Safety Appliance Act. The questions
642 presented are those decided by this court on an appeal by the defendant from an order denying the defendant's motion for judgment notwithstanding the verdict or for a new trial which decision of this court was filed in this court April 17, 1924. Following the decision in that case the judgment hereinbefore referred to is affirmed.

Judgment affirmed.

May 21st, 1924, Petition presented and order for stay granted. 643

(Title of Cause.)

PETITION FOR STAY.

To the Honorable the Supreme Court of Minnesota: Defendant and appellant in the above entitled action most respectfully represents:

That it feels itself aggrieved by the decision and order for judgment of this Court herein confirming the judgment of the Court below and ordering 644
the entry of final judgment in this court.

That defendant and appellant does therefore, desire in good faith to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of the Court when entered and will use all due diligence to submit its petition and the record herein as soon as it is reasonably possible.

Wherefore defendant and appellant prays the order of this Court staying all proceedings herein 645
during the pendency of its application and petition to the Supreme Court of the United States for a writ of certiorari.

Dated May 21, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,

By A. G. BRIGGS,

Attorney.

646

(Title of Cause.)

ORDER.

Upon application of the defendant and appellant in the above entitled action.

It Is Ordered, that upon and after the entry of final judgment herein as directed by the Court in its decision and order entered and filed on the
647 20th day of May, 1924, all proceedings herein and in the District Court of Yellow Medicine county, Minnesota, including the issuance of any writ of execution out of either Court, be and hereby are in all things stayed pending the petition for writ of certiorari to the Supreme Court of the United States and proceedings had thereon.

S. B. WILSON,
Chief Justice,
Supreme Court of Minnesota.

648

May 24, 1924, Principal, costs and disbursements taxed $26,482.24. 649

(Title of Cause.)

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the court below, herein appealed from, to-wit, of the District Court within and for the County of Yellow Medicine, be and the same hereby is in all things affirmed. 650

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of twenty-six thousand four hundred eighty-two and 24/100 dollars ($26,482.24) costs and disbursements in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed May 24, 1924.

By the Court.

Attest: GRACE F. KAERCHER, 651
Clerk.

STATEMENT FOR JUDGMENT.

Statutory costs	$25.00
Amount of Judgment	26,387.80
Interest from May 8, 1924, to May 24, 1924	69.44
Total	$26,482.24

652

STATE OF MINNESOTA,

Supreme Court. ss.

I, Grace F. Kaercher, Clerk of said Supreme Court, do herely certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said
653 original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, May 24, A. D. 1924.

GRACE F. KAERCHER,

(Seal) Clerk.

By PETER O. SCOW, Deputy.

Filed May 24, A. D. 1924. Grace F. Kaercher Clerk.
654

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 192–

No. 1075

CHICAGO GREAT WESTERN RAILWAY COMPANY, Petitioner,

vs.

A. D. SCHENDEL, Special Administrator, etc.

ORDER ALLOWING PETITION FOR CERTIORARI

On Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Minnesota, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

June 9, 1924.

FILED
JUN 2 1924
WM. R. STANSB
CLE

No. [redacted]422

IN THE

SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF, TOGETHER WITH NOTICE OF APPLICATION AND ACKNOWLEDGMENT OF SERVICE THEREOF.

ASA G. BRIGGS,
Counsel for Petitioner,
St. Paul, Minnesota.

IN THE

SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

NOTICE OF APPLICATION FOR A WRIT OF CERTIORARI.

To Tom Davis and Earnest A. Michel,
his Attorneys of Record:

You, and each of you, are hereby notified that on Monday, June 2nd, 1924, at the convening of Court, or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States a petition for writ of certiorari and brief in support thereof, praying the Honorable the Supreme Court of the United States to cause to be issued a writ of cer-

tiorari directed to the Supreme Court of the State of Minnesota and the District Court of Yellow Medicine county of said state, commanding said courts to certify to the United States Supreme Court for review a transcript of the record and proceedings of said District Court and said Supreme Court in the cause entitled A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, deceased, Respondent, vs. Chicago Great Western Railroad Company, appellant, No. 23898 of said Supreme Court of the State of Minnesota. A true copy of petition for writ of certiorari and brief in support thereof are hereto attached and made a part hereof.

Noa S. Driggs

Counsel for Petitioner.

Service of the foregoing Notice of Submission and a copy of the Petition for Certiorari and Brief in support thereof are hereby acknowledged this 27. day of May, 1924.

John Davis and Ernest A. Michel

Counsel for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

STIPULATION FOR DATE OF SUBMISSION.

It Is Hereby Stipulated by and between the parties to the above entitled action, through their respective attorneys, that the petition for writ of certiorari in the above entitled matter may be brought on and submitted for hearing on the 2nd day of June, 1924, and respondent hereby waives the two weeks' notice required under the rules governing applications for writs of certiorari.

Dated this 23rd day of May, 1924.

ASA G. BRIGGS,
Attorney for Petitioner.

DAVIS & MICHEL,
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court
of the United States:

Now comes the Chicago Great Western Railroad Company and respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Minnenota, and to remove therefrom to this court for review the record in the case there lately pending, entitled A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, Respondent, vs. Chicago Great Western Railroad Company, Appellant, being cause No. 23898 on the docket of that court, the petitioner herein being the said defendant.

A duly certified copy and nine (9) uncertified copies of the entire record, including all proceedings in the District Court of Yellow Medicine county (Minnesota), where the said cause was tried, and in the Supreme Court of the State of Minnesota, to which court an appeal was taken from the judgment of said District Court, are filed herewith under separate cover.

Petitioner presents this application for writ of certiorari with a conviction of the justness of its position and respectfully prays that its petition be granted, to the end that the particular points raised herein may be fully and finally considered and determined.

STATEMENT OF FACTS.

(The figures in parenthesis refer to the folios in the printed record.)

This action was instituted in the District Court of Yellow Medicine county, Minnesota, by the respondent A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, to recover damages for the death of Ring, who received fatal injuries while in petitioner's service as a brakeman.

On October 4, 1922, a west-bound freight train, upon which Ring was employed as a brakeman, stopped at Budd, Iowa (31) to take siding and meet an east-bound train. Ring's train stopped just before it reached the pasing track switch; the switch was thrown and the train started to pull in on the siding. In starting the train a draw-bar was pulled out and an immediate stop was made (33).

The train was standing on a reverse curve and Conductor O'Leary sent Ring to tell the head end brakeman (Quist) to get in position where he could pass on signals to the engine (34). Ring did this; the head end backed up and was chained to the bad order car for the purpose of pulling the train in on the passing track, and switching the bad order car out of the train (35 and 65). They pulled in on the passing track and stopped. The movement contemplated was to bring the engine around to the rear of the train, remove that por-

tion of the train behind the bad order car, leave the bad order car standing on the passing track, couple the two parts of the train together, and proceed (64-69).

After the train had come to a stop on the passing track, brakeman Quist was told by Ring to cut off the engine, and bring it to the rear of the train (298-302-306).

After sending Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one on each side of the coupler (37). As they were working there, the car upon which they were working ran back nearly a car length. The conductor walked back with the movement of the train, but Ring, for some reason not disclosed by the evidence, locked his arms around the axle of the bad order car. There was considerable slack in the chain. He then swung his legs and finally his body up over the chain and maintained that position until the train stopped (46). He made no effort to step out from between the cars, although, as the conductor testified, his "idea would be to get out of there" (42). The backward movement was very slow—about two miles an hour (43). The train stopped suddenly, bringing the chain up taut, squeezing Ring between the chain and the draft timber above him, from which injury he died about fifteen days later.

The cause of the train movement is described by brakeman Quist. He first secured "slack" by a short backing movement of the engine (303). He

"pulled the pin" and signaled the engine to go ahead. The train was standing on a grade (326) so that the train when the engine was cut off started a slow backward movement which brakeman Quist stopped by turning the angle-clock on the head car and setting the air (304). It was during this short movement that Ring received the injuries from which he died.

There was a rule of the company providing that employes must give the engineer knowledge that they are going between or under cars and they must know that the engineer has seen and understood their signal before they put themselves in a dangerous position, such as going between the cars (266-267). Ring gave no warning to the engineer that he was going between the cars (268-269). He was familiar with the rule as well as with the grade on which the train stood (264-265). The trial court refused to permit the jury to consider this question in connection with determining the proximate cause of the injury, or for any other purpose (543-544).

An appeal was taken to the Supreme Court of Minnesota from the order of the trial court denying a motion for judgment notwithstanding the verdict or a new trial.

On April 17, 1924, the Minnesota Supreme Court affirmed the order of the trial court, and ordered judgment for the respondent. Final judgment was entered in District Court against your petitioner on May 8th and affirmed by the Supreme Court of Minnesota on May 20, 1924.

THE QUESTIONS INVOLVED.

Your petitioner further states that the questions involved herein are as follows:

First. The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the side track and had ceased to be "used" as contemplated by the Act.

Second. The defective draw-bar did not proximately contribute to the injury.

(a) There were three active forces intervening which, when combined, constituted the intervening, efficient force and operated to make the faulty coupler a remote cause or condition, to-wit:

(1) Ring himself sent the brakeman Quist with directions to cut off the engine without advising him or the engineman that he was going between the cars. It was in carrying out Ring's directions that any motion of the train took place. Ring controlled the movement of the train (298-300).

(2) In placing himself between the cars without notifying the engine crew he knowingly and wilfully violated a rule promulgated for his benefit (264-265). This together with the instructions he gave Quist to cut off the engine on the grade was more than contributory negligence.

(3) When the backward movement started instead of stepping out from between the cars to a

place of safety as he could have done, and as the conductor did (38-42) he swung his legs and then his body up, and over the sagging chain and by so doing deliberately invited death or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and draft rigging. The emergency was created by Ring's instructions to Quist and Ring's going between the cars without notice to Quist or the enginemen.

(b) The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely under all the circumstances that it could not reasonably be foreseen. No one would anticipate that Ring would put himself in the position he assumed at that time, especially in view of Ring's knowledge and violation of the rule made for his protection.

Third. The question of deceased's violation of rules should have been submitted to the jury. The violation of the rule constituted negligence subsequent to and independent of the question of defective safety appliance. Your petitioner was entitled to have this fact considered by the jury in determining the proximate cause of the injury.

PRAYER.

In order to correct the error complained of and to the end that the right and liability of petitioner may be determined in accordance with Federal law, your petitioner prays that a writ of certiorari may be issued under the seal of this court directed to the Judges of the Supreme Court of the State of Minnesota and of the District Court of Yellow Medicine county commanding them, and each of them, to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Minnesota in the within cause to the end that the judgment of said Supreme Court of the State of Minnesota, in said cause may be reviewed by this court as provided by law, and that your petitioner may have such other relief as to this court may seem appropriate.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Petitioner.

By .....

Attorney for Petitioner.

STATE OF MINNESOTA,

County of Ramsey. ss.

ASA G. BRIGGS, being first duly sworn, says that he is the attorney for the petitioner, Chicago Great Western Railroad Company; that he has read the foregoing petition; that he has also read the certified copy of the transcript of record under the seal of the Supreme Court of the State of Minnesota in the case of A. D. Schendel, as Special Administrator of the Estate of Edmund Ludwig Ring, Deceased, Respondent, vs. Chicago Great Western Railroad Company, Appellant, and that he is familiar with the same; that he has also read a copy of the opinion of said Supreme Court in said cause; that the matters of fact stated in said petition conform to said record and opinion and are true to the best of his knowledge, information and belief.

ASA G. BRIGGS.

Subscribed and sworn to before me this 15th day of May, 1924.

A. V. JUNKIN,

(Notarial Seal) Notary Public,

Ramsey County, Minn.

My commission expires Sept. 19, 1930.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE FACTS DO NOT BRING THE CASE WITHIN THE SAFETY APPLIANCE ACT. THE CAR HAD COME TO REST ON THE SIDETRACK AND HAD CEASED TO BE "USED" AS CONTEMPLATED BY THE ACT.

As stated in a recent Federal case involving Section 2, Act of March 2, 1893, as amended 29 Stat. 85, and Act of March 2, 1903, 32 Stat. 943, "the association of the word 'used' with the words 'hauled or permitted to be hauled on its line' clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement."

McCalmont v. Penn. Ry. (1921), 273 Fed. 231. Aff. 283 Fed. 736.

And this also is what the defendant contends is meant by the term "use".

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line at Budd. It was then chained up and hauled onto the side track, to be taken out of the train. Now, during this movement nothing occurred. The car was safely shoved in to rest on the siding and at

that moment, having so been placed on this side track, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case. To illustrate our point we recite the facts and holding in the McCalmont case, supra. The defective car had been placed on a siding. It was chained to another care and deceased went between the cars to adjust the chain length without putting out a signal as required by the rules. While so doing another car was "kicked in," colliding with the defective car and killed the plaintiff's intestate. The Court there said:

> "In addition thereto it does not seem to me that the car which caused the injury was in use within the meaning properly to be given to that word under the Safety Appliance Act. The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it on a dead track and the hauling or the movement of it from that dead track to the repair place which is permitted to be done only at the risk of the defendant, had not yet begun, and was not then in immediate contemplation * * * he was merely making a temporary repair to the car upon the dead track so that at some future time it might thus be moved or hauled. The law does not forbid or prohibit work upon a car on a dead track so as to put it into condition thus to be moved or hauled; nor does the law impose an absolute liability upon the interstate carrier for injury sustained by one engaged in doing that kind of work. In that situation and while doing that kind of

> work the applicable law, it seems to me, would be the negligence rules provided by the Federal Employers' Liability Act and not the absolue liability of the Safety Appliance Act.
>
> For the foregoing reason I am of the opinion that defendant's motion (for judgment) should be granted."
>
> McCalmont case, supra, at page 240.

Now, in that case, and in the one under discussion, the salient points are the same, in that in both the car was on the siding; the car was standing still; there was a defective coupler; the deceased was adjusting or uncoupling a connecting chain, and there was a violation of the company's rules governing the situation.

As in that case the car was out of service. It had ceased to be "used." If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law. If they hauled the car they violated the act, and if they did not haul the car they violated the act.

Another case apparently sustaining the view that this case does not come within the Safety Appliance Act is that of *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441.

A conductor was endeavoring to adjust a faulty coupler at one end of a string of cars when other cars were shoved in on the same track and struck the one he was working on in such a way as to kill him.

In denying the plaintiff's requested instruction upon assumption of risk, the trial court said:

> "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads: 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Sec. 4."

The refusal of the requested instruction was sustained by this court.

We see no essential difference in the situation in that case and the one at bar. It cannot be that the company is without an alternative to avoid the absolute liability of the Act under these circumstances, whether it uses the car or sets it out. This car was no longer being "used" by defendant and had been placed on the siding to avoid using.

Petitioner earnestly contends that this case does not come under the Safety Appliance Act. It comes under the Federal Employers' Liability Act and is governed by the rules of negligence of that act.

II.

THE DEFECTIVE DRAW-BAR DID NOT PROXIMATELY CONTRIBUTE TO THE INJURY IN THIS CASE.

The question of whether a particular act is remote or proximate, it is contended, is purely a question of law. The jury may have a function in drawing certain inferences and determining disputed facts, but where the facts are clear the court, through definite principles of law, determines the limits of proximity and does not leave it at large to the jury.

It is the defendant's contention that while the defective coupler under the law may have at one time constituted an active force, it had, prior to the accident, when the car had come to rest on the side track, become a *passive* force. Each time one or more active causes operate on a condition to create a new condition, a new causal step is taken, ending with a given result. This result is the direct result of the active force which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. *In other words, the subsequent coming into action of any other force is the direct cause of the result.* All other forces are indirect and at the time of the intervention become *ipso facto* remote. The final active force must be the efficient cause which is more commonly called proximate.

The most common way of enunciating the rule of liability is that the injury must be the natural

and probable or natural and proximate result of defendant's act. A more accurate phrase would be that *the intervening force must be foreseeable, otherwise the result is made remote.*

A. THERE WERE THREE ACTIVE FORCES INTERVENING, WHICH, WHEN COMBINED, CONSTITUTED THE INTERVENING EFFICIENT FORCE AND OPERATED TO MAKE THE FAULTY COUPLER A REMOTE CAUSE OR CONDITION, TO-WIT:

1. Ring himself sent the brakeman, Quist, with directions to cut off the engine. It was in carrying out his direction that any motion of the train took place. Ring controlled the movement of the train (298-299-300).

2. In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit (264-265), which constitutes more than contributory negligence in view of his instruction given to Quist. Danger was not remote, but immediately imminent. It must be conceded that the violation of this rule constitutes negligence. 18 R. C. L., Sec. 152. And its relation to proximate cause will be discussed under the next subdivision of this brief.

3. In addition to this, when the backward movement started, instead of stepping out from between the cars to a place of safety, as he could well have done, and as the conductor did (38 and

42), he swung his legs, then his body up and over the sagging chain, and by so doing deliberately invited death, or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and the draft rigging.

We are not trying to convert actual contributory negligence into proximate causation as has been contended by respondent.

The principles of causation have not been changed by any statute and remain as at common law, and

> "It has been the policy of the common law to fix liability *in solido* with reference to the cause which stands closest to and in most immediate connection with the injurious result."
>
> 18 R. C. L. 156.
>
> See Ann. Cas. 1913 B. 791.

As it is said of compensation cases, the doctrine of *novus actus interveniens* always asserts itself in these cases, because it forms the basis of controversy, viz., the more immediate cause of the injury; but the weight of authority is to make the liability of the original actor depend upon whether such negligent or even wilful intervening act was foreseeable.

Pollack, Torts 37.

In addition to the rule of the defendant violated by Ring, the plaintiff is confronted with the following general common law rule: That a railroad employee when about to put himself in such a

position with respect to a stationary car, if it should be moved unexpectedly, he would in all probability be injured, is bound to notify all other employes whose work may in its progress produce a movement of the car, or put out some signal which will show them where he is.

L. R. A. 1918 C., p. 380.

Illinois, etc., v. Winslow, 56 Ill. App. 462.

In view of the circumstances intervening, the one time negligence of the defendant became *remote* and at the time of the accident became the *occasion* which merely provided an opportunity for the intervening causal agencies to act; or it may even have set them in motion. The statute has not changed the rules relating to proximate cause.

The New International Dictionary says:

> "The *cause* of an effect is that which actually produces or brings it about; the *occasion* is that which either directly or indirectly provides an opportunity for the causal agencies to act or serves to set them in motion."

The question of a wilful violation of the rule is infinitely important on the question of proximate cause, more especially that phase of it dealing with whether Ring's act was foreseeable by the defendant.

We cite *Kentucky, etc., Ry. v. Minton*, 180 S. W. 831, as a case involving this question.

Plaintiff undertook to repair a defective coupler on a car standing on the side track, without putting out any signal that he was assuming a dangerous position. While in that position a string of cars was shoved in, moving the one upon which plaintiff was working, seriously injuring him. After reviewing the facts, the Court said:

> "We conclude, then, that under the facts and circumstances exhibited by the record, it was the duty of plaintiff to have observed the rule, unless same had been abrogated by some custom or usage, or mode of conduct, or other excusing circumstances, in which all parties participated, *and his failure to do so constituted negligence on his part which was the sole producing cause* in law of his injuries."

And as in that case a rule which had not been abrogated by custom, usage or other mode of conduct was violated by Ring, resulting in his death. Wherein has the coupler played a part except as providing an occasion for his being there? A rule of law and a rule of the defendant's were both violated by Ring.

The exact point involved in this case is well illustrated in the recent case of *Rittenhouse v. St. L. & S. F. Ry. Co.*, 252 S. W. 945 (Mo.) The syllabus reads:

> "Where a car repairman was injured immediately after placing himself in a perilous position between two cars on an active switching track, the fact that he failed to realize his peril did not relieve him of the duty to warn

the crew of his intention to enter between the cars.

"*Held*, that his failure to warn the switching crew, and not the defective coupler, was the proximate cause of the injury by the movement of a third car."

The fact that Ring controlled the movement of the train is entitled to serious consideration by the Court. Illustrative of this point is the recent case of *Davis v. Hand*, 290 Fed. 73. In that case Hand gave the signal that moved the train. In the case at bar Quist gave the signal at Ring's direction, and so in effect it was Ring's signal.

Illustrative of a defective appliance providing an *occasion* for an accident and not being the proximate cause is found in *Phillips v. Penn. R. R.*, 283 Fed. 381, as well as in the case of *Great Northern Ry. v. Wiles*, 240 U. S. 444.

B. THE PROBABILITY THAT AN INJURY WOULD BE CAUSED BY THE ALLEGED VIOLATION OF THE SAFETY APPLIANCE ACT WAS SO UNLIKELY, UNDER ALL THE CIRCUMSTANCES, THAT IT COULD NOT REASONABLY BE FORESEEN.

Was Ring's act in assuming this dangerous position under the circumstances of this case reasonably foreseeable by Quist or the enginemen drawing the train? They had been directed by Ring to do what they did do with no word or signal from Ring that he was going between the cars. They had a right to understand he was not between the

cars. With this knowledge they were not negligent.

When the company lays down common sense rules for the protection of its employees may it not rely upon their observance, as the natural course of events? The rule book in this case provided as follows (267-268):

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."
>
> (Ex. 26, 267-268.)

This rule was not complied with (268-269).

Because of the rash act of the deceased in omitting to notify or signal the engineer of his intended move, the latter was warranted in believing it was safe to uncouple the engine from the train, especially on the orders of a brakeman sent there for that specified purpose by the deceased, Ring. Quist had been ordered there to handle the engine, to direct the engineer in pulling in on the siding *and thereafter to cut off the engine and "come around."* To do so required slack, and this was well known to the deceased. He also knew the grade conditions.

This rule was made for the protection of the employees—each knowing it relies on the other's observance. It is one of the most valuable and beneficial rules promulgated by the company. There is no evidence of its disregard. Its observance constituted the very essence of safety and protection to fellow workers. It is not a rule that could be said to be in conflict with the law, but is in furtherance of the law—bringing home to men working side by side the duty imposed upon them by common prudence, and by the law without a rule.

The proximate consequences for which a defendant is liable are restricted to those which should reasonably have been foreseen, and we submit defendant was not required to foresee this grossly negligent conduct of Ring's. To impose such a duty would be to impose the impossible. The coupler was out of use. The movement of the train was one of the causes of the accident. Ring's instructions to Quist was another, and Ring's violations of the rule was a third. All of these causes intervened after the coupler defect. The defective coupler, as stated, only provided the occasion.

Quoting from *San Antonio, etc., Ry. Co., v. Behne*, 231 S. W. 354 (Tex.):

> "*The causal connection between the negligence which put in motion that agency, and the injury, is not controlled by the fact that the agency acted directly upon the injured party.* The causal connection was broken in contemplation of law, by the intervention of

> disconnected and independent agencies brought into being by a chain of circumstances so improbable as to render them in law unforeseeable."

The violation of the Safety Appliance Act, if any, had spent itself when the cars came to rest and was at most only reflected in the physical setting which the cases describe as the "occasion" or "condition" of the injury, as distinguished from its proximate cause.

We submit, in concluding this section of the brief, that the injury, under the evidence, cannot be attributed to a violation of the provisions of the law, but only that, it provided the occasion for the accident. In other words, an attempt to apply the "but for" rule is made by the respondent. That rule has long been abandoned for it involved the tracing of endless conditions and circumstances too devious for the courts to follow and administer substantial justice.

III.

THE QUESTION OF DECEASED'S VIOLATION OF RULES SHOULD HAVE BEEN SUBMITTED TO THE JURY. THE COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION TO THIS EFFECT.

The trial Court refused to submit the question of deceased's violation of the rules for any purpose, even as bearing on the question of proximate cause. He attempted to leave to the jury the ques-

tion of proximate cause in a general way and refused to permit the jury to consider the violation of this rule in that connection, saying, "I don't believe that is the law," and his ruling was sustained by the Supreme Court.

The charge of the Court is in effect a withdrawal of the question of proximate cause. For the Court says, "that the decedent violated those rules, would not be a defense to the company, or defendant." One of the causes of this accident was the violation by Ring of this rule. The Court tells the jury that this negligence of Ring's is no defense, which is equivalent to saying his negligence cannot be the proximate cause. This is said to the jury in such a plain and emphatic way at the conclusion of the charge and just as the case went to the jury, that it carried great weight. It was done by the Court with full and fair knowledge of the contention we now make. All that had previously been said about proximate cause was nullified.

> "Not only has an employer a strict legal right, but there rests upon him a legal duty as well to promulgate rules and regulations for the guidance and protection of persons who may engage in his services. There is correlatively an obligation resting upon employees to yield obedience to all proper rules and orders; and if an employee sustain an injury by reason of a violation of the employer's regulations, orders or commands, he will be barred of all right of recovery from the employer on the score of the latter's negligence"
>
> * * *

Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."

18 R. C. L., Sec. 152.

See Ann. Cas. 1912 A. 91 (85).

"Where the evidence is conflicting the question of whether the violation of the rule was or was not the proximate cause of the injury is properly submitted to the jury."

Hampton v. Chicago, etc., R. Co., 86 N. E. 243 (Ill.).

And putting it conversely:

"The violation of a rule by an employe where such violation is the proximate cause of the accident is negligence as a matter of law."

Fernette v. Pere Marquette Ry., 141 N.W. 1084 (Mich.).

There can be no doubt but what under certain conditions the violation by a servant of a regulation adopted by the master for the safety of the servant is negligence *per se* on the part of the servant.

G. N. Ry. Co. v. Hooker, 170 Fed. 154.

And such violation always goes to the question of negligence whether due to thoughtlessness or willfulness.

Gleason v. Detroit, 73 Fed. 647.

Lake Erie, etc., v. Craig, 80 Fed. 488.

In speaking of compensation cases, where even most strict liability is imposed, it is said:

> "Violations of rules designed to safeguard the employees is generally held, as a matter of fact, to constitute wilful misconduct, and to debar the employee, or his dependents, in case of death, from any right to recover compensation."
>
> 4 A. L. R. 119, note.

We have shown by numerous citations from cases and encyclopedic works that the rule violation constitutes negligence from whatever angle it is viewed. It follows that if it is evidence of negligence it must be considered together with the other acts of negligence, and the other intervening circumstances, to fairly determine proximate causation. Even aside from the other two intervening agencies we had a right to have this question sbmitted to the jury, for

> "Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."
>
> 18 R. C. L., Sec. 152, and cases cited.

The Court below not only refused defendant's requested instruction that the rule *might* be taken into consideration in determining proximate cause, but affirmatively charged the jury that it *could not* be taken into consideration for any purpose (541-543). And it thereby committed error that only a new trial can remedy.

We submit that the petitioner was deprived of the rights given it under the Federal law involved in this case, that the decision is at variance with

the holdings of this court, and that the writ of certiorari should go.

Wm. E. Briggs

Attorneys for Petitioner.

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No. 422.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

REPLY TO MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

ASA G. BRIGGS,
Counsel for Petitioner.

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I.

THE WRIT WAS PROPERLY GRANTED AND THE COURT CORRECTLY APPRIZED OF THE FACTS.

The petitioner takes exception to the charge of respondent that the court has been misled as to the facts and as a consequence the writ was improvidently granted. The petition for the writ disclosed

the facts and issues just as petitioner understands them and just as they appear on the record. Counsel had and took their opportunity to place before this court, their version of the facts. They filed a brief and accepted the facts stated in the petition as satisfactory. They made no complaint at that time.

No reason exists why this cause should be accorded different treatment than other like causes brought regularly before the court by certiorari, or why the rules of procedure adopted by the court should be set aside for the convenience of respondent and petitioner be forced to an inadequate and summary disposition thereof.

I.

It is admitted that the train upon which Ring was a brakeman was engaged in Interstate Commerce and that a conductor was in charge thereof; that the car was drawn a few car lengths from the main line to the passing track with a defective drawbar, but deny that any injury occurred during the time it was so in use. The injury was received after the car had ceased to be in use. Respondent has assumed (bottom page 5) that the injury occurred during the movement from the main line to the side track. The record discloses that that movement was completed without a mishap. Thereafter and when the car had been set in on the side track Brakeman Quist was told by Ring to cut off the engine and bring it to the rear of the train

(298-302-306). After Ring sent Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one on each side of the coupler (37). When the engine was cut off this car ran back about one car length and the front car of the train about five to seven feet before Quist got the angle cock turned and the air set. The Minnesota Supreme Court not quite accurately says: "The train *backed* up without warning and the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain, apparently to ride thereon* in the brief movement of the train." The chain pulled taut and injured him. The State Court here recognized facts which, together with the other negligence of Ring, constitute the sole cause of the accident. No one directed Ring to assume this position of obvious danger.

As we have more fully set out in our brief, Brakeman Ring sent Brakeman Quist to cut off the engine and any movement that occurred resulted from this direction. It is immaterial what authority Ring, the senior and rear brakeman had over the head brakeman—it is a fact that Ring directed Quist as follows:

> "Q. And then what did you do?
>
> A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear. He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, I took it to mean that I should go in and go around with the engine.

Q. That expression?

A. *That means that, to go around about my business, to go up there and get into clear, and come back.*

Q. Cut off the engine?

A. Yes, cut off the engine, and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir." (297-299.)

Quist acknowledged this direction from Ring and carried it out. Ring gave the order to Quist and *he thereby controlled the particular movement* that caused his death. Following the giving of this order he violated a fundamental rule that had been made for his guidance and safety by going between the cars without notice to the enginemen. He did this before his directions to Quist had been complied with. When the engine was cut off, and in consequence thereof, the movement occurred. The

fact that the conductor accompanied him when he went between the cars in no way relieves him from responsibility. The fact that a conductor was in charge of the train operates in no way to relieve Ring from his obligation to signal the engineer of his intent to go between the cars. The duty to give this signal rested on Ring whether he was in charge of the train or not. This obligation rests on all trainmen when going between cars in a train.

Respondent's brief is redundant with assertions that Conductor O'Leary was in charge of the train. That is true. We stated in our brief that O'Leary was the conductor.

It is said we misrepresented the facts in stating that the case does not come within the Safety Appliance Act. This was a statement of a plain conclusion of law—a point to be argued when the case is heard on the merits. Whether or not the court accepts our view should be determined after argument on the merits. Respondent's quotations from the Minnesota Supreme Court are unfavorable to us. That was our reason for seeking this writ.

Whether or not the car was "at rest" on the side track is another point to be determined on final hearing. Merely asserting that it is or is not does not make it so. If it was at rest the cases we cite are authority for the position we take.

On page 19 of their brief counsel again have confused a conclusion of law heading one section of our brief to the effect that "the probability that the injury would be caused by the alleged violation of

the Safety Appliance Act was so unlikely that it could not reasonably be foreseen." Counsel have attempted to conclude this point by calling attention to the fact that a violation of the statute is negligence *per se*. Our point has direct reference to proximate cause and we had always thought it fundamental that no one was held for an unforeseeable consequence of his negligent act, for an unforeseeable consequence is not a proximate result. The fact that negligence exists is always assumed in treating proximate cause.

THE RULE VIOLATION.

On page 20 of the brief respondent argues that Ring's violation of the rule pertaining to going between the cars could be no more than contributory negligence at the most. Not only would the jury have been justified in finding that Ring's violation of this rule was the sole proximate cause, but they could have and should have taken this evidence of Ring's negligence into account *with the other acts of negligence* in determining the proximate cause of the unfortunate result. *This they were not permitted to do.* The trial court forbade the jury to take this rule into account "for any purpose." (541-543.) Respondent's contention is met by the rudimentary mathematical proposition that no part of the whole can equal the whole. Their contention is that this negligent act of Ring's, standing alone could not be a defense, therefore the jury should not be permitted to consider it. Our contention is that petitioner had an absolute right to

have *all* evidence of negligence considered by the jury in determining the proximate cause, and the fact that this right was denied is assigned as an error for review.

At page 21 of respondent's brief objection is made to our use of the term "dead track." In view of the very full statement of all the circumstances and movements, however, the character of the track and the use to which it was put, was made plain in our petition and we cannot feel that the court could in any manner have been misled by any misuse of this single term. The track was as to this car a dead track because this car was to be cut out of the train where it was on this track. If the use of the term "dead track" was not entirely appropriate it could not mislead because it appears clearly that the track was a passing track on which the whole train stood.

II.

The authorities cited by respondent, to the effect that a cause will be dismissed where the writ is improvidently granted, are controlling, and properly so. But they are of no value when the writ is not improvidently granted, and where the court has been fully advised of the facts by petitioner. Respondent filed an answer to the petition for this writ. No exception was taken therein to any of the statements now complained of.

One reason respondent urges (page 23) is that the "lower courts" (there being one trial and one appellate court) were unanimous in holding the

petitioner liable for this accident. That both of the lower courts are adverse to the petitioner affords no presumption that this court did not properly consider its action herein.

Respondent presents what is claimed to be another "misstatement" (page 24 of its brief). It is claimed that our brief stated "that the cause involved a grave question of vital importance to the public." There is no such statement in the petition.

Respondent asserts (page 27) that the practice of railway companies in filing petitions for writs of certiorari in "simple personal injury cases" is a continuing and growing one, and inferentially urges that this court discourage the "practice" and indicate its attitude by dismissing the present writ —affirming the judgment without allowing petitioner to be heard.

This summary disposition of the matter would doubtless be highly pleasing to respondent, but the court must also take notice of another practice likewise continuing and growing—that unparalleled wave of personal injury suits, accompanied by prodigious verdicts with an undue tendency of some courts to sustain verdicts for plaintiff. Defendants should be denied recourse to the courts of review—a right of every litigant. It is their only protection against erroneous rulings below.

We have here a case brought under Federal law and involving from the outset the question of whether under this set of facts liability is imposed by the Federal law and holdings of this and inferior Federal tribunals.

This Honorable court, after reviewing the facts of the case, which are not altered by respondent's motion, has seen fit to grant a Writ of Certiorari to the end that questions raised herein might be fully and finally argued and determined. The court has considered the petition and granted the prayer and a brief is now being prepared to submit at the proper time. There seems to be no good reason why the matter should be disposed of in the extraordinary manner sought by respondent.

There is probably no cause that reaches this court that is not as much entitled to advance hearing as is this cause. There is nothing unusual in this respect about this cause.

We feel that respondent's claims that the court has been illy-advised, has illy-considered its action and improvidently granted the writ and that the cause should be advanced and placed on the summary docket is not well taken, and accordingly pray that the motion in all respects be denied.

Respectfully submitted,

ASA G. BRIGGS,
Counsel for Petitioner.

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WM. R. STANS

No. 422

IN THE

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OCTOBER TERM, 1924.

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vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

BRIEF OF PETITIONER.

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No. 422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

BRIEF OF PETITIONER.

STATEMENT OF CASE.

(The figures in parenthesis refer to the folios in the printed record.)

This case is brought to this Court upon a Writ of Certiorari granted to petitioner (the defendant below) to review a judgment of the Supreme Court of the State of Minnesota (650) affirming a judgment of the District Court of Yellow Medicine

County (624) entered upon a verdict of a jury (543) awarding damages in the sum of $25,000 to plaintiff for the death of Ring, who received fatal injuries while in petitioner's service as a brakeman.

On October 4, 1922, a west-bound freight train, upon which Ring was employed as rear brakeman, stopped at Budd, Iowa (31-33), to take siding and meet an east-bound train. Ring's train stopped just before it reached the passing track switch; the switch was thrown and the train started to pull in on the siding. In starting the train, a draw-bar was pulled out and an immediate stop was made (33).

The train was standing on a reverse curve and the conductor (O'Leary) sent Ring to tell the head end brakeman (Quist) to get in position where he could pass on signals to the engine (34). Ring did this; the head end backed up and was chained to the bad order car for the purpose of pulling the train in on the passing track, and cutting the bad order car out of the train (35 and 65). They pulled in on the passing track and stopped. The movement contemplated was to bring the engine around to the rear of the train, remove that portion of the train behind the bad order car, leave the bad order car standing on the passing track, couple the two parts of the train together, and proceed (64-69).

After the train had come to a stop on the passing track, Ring told head brakeman Quist to cut off the engine, and bring it to the rear of the train (298-302-306).

After sending Quist to the engine, Ring and O'Leary, without the knowledge of Quist or the enginemen, went to the bad order car to unhook the chain (36), one stood on each side of the coupler (37). As they were working there, the car upon which they were working ran back nearly a car length.

The Minnesota Supreme Court not quite accurately says: "The train *backed* up without warning and the conductor straightened up and walked back with the movement of the train" (596). The train did run backward a *few* feet because it was standing on a grade. No "warning" to Ring was called for because the movement was made in compliance with Ring's direction to Quist. *Some* movement was bound to occur in following Ring's direction. The Court also says, in exact accordance with the facts, "the decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain, apparently to ride thereon* in the brief movement of the train" (596).

He made no effort to step out from between the cars, although, as the conductor testified, his "idea would be to get out of there" (42). The backward movement was very slow—about two miles an hour (43). The train stopped suddenly, bringing the chain up taut, squeezing Ring between the chain and the draft timber above him, from which injury he died about fifteen days later.

The cause of the train movement is described by brakeman Quist. He could not uncouple because

the pin was held tight because of position of train on the grade (302). He first secured "slack" by a short backing movement of the engine (303). He uncoupled and signaled the engine to go ahead. The train was standing on a grade (325-326), and when the engine was cut off, started a slow backward movement. Brakeman Quist turned the angle-cock on the head car and set the air (304). The front car ran back from five to seven feet (304). The car where Ring was hurt ran back about 40 or 42 feet (43). It was during this short movement that Ring received the injuries from which he died.

There was a rule of the company providing that employes must give the engineer knowledge that they are going between or under cars and they must know that the engineer has seen and understood the signal before they go between cars (266-267). Ring gave no warning to the engineer that he was going between the cars (268-269). He was familiar with the rule, as well as with the grade on which the train stood (264-265). He went in there on his own accord (40). The trial court refused to permit the jury to consider this rule or its violation in connection with determining the proximate cause of the injury, or for any other purpose (562-563).

An appeal was taken to the Supreme Court of Minnesota from the order of the trial court denying an alternative motion for judgment notwithstanding the verdict, or for a new trial (578).

On April 17, 1924, the Minnesota Supreme Court

affirmed the order of the trial court, and ordered judgment for the respondent (587-614 inclusive). Final judgment was entered in District Court against your petitioner on May 8th and affirmed by the Supreme Court of Minnesota on May 20, 1924 (641).

A writ of certiorari was sought in this court and granted on June 9th, 1924 (Page 219 of Record).

The Questions Involved.

The questions involved herein are as follows:

First. The facts do not bring the case within the Safety Appliance Act. The car had ceased to be "used" as contemplated by the Act.

Second. The defective draw-bar did not proximately contribute to the injury.

(A) There were three active forces intervening, which, when combined, constituted the intervening, efficient force and operated to make the faulty coupler a remote cause or condition, to-wit:

(1) Ring himself directed Brakeman Quist to cut off the engine without advising him or the enginemen that he was going between the cars. *In carrying out Ring's directions the movement of the train took place. Ring thus controlled the movement of the train* (298-300).

(2) In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit and safety (264-265). This was more than

contributory negligence in view of the directions he gave Quist with the train standing on a grade.

(3) When the backward movement started, instead of stepping out from between the cars to a place of safety, as he should have done (42), and as the conductor did (38-42), he swung his legs and then his body up, and over the sagging chain, and, by so doing, deliberately invited death or serious injury. The chain pulled taut when the movement ceased and he was caught between the chain and draft rigging. The emergency was created by Ring's instructions to Quist and Ring's going between the cars without notice to Quist or the enginemen.

(B) The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely under all the circumstances that it could not reasonably be foreseen. No one would anticipate that Ring would put himself in the position he assumed at that time, especially in view of Ring's knowledge and violation of the rule made for his protection.

Third. The question of deceased's violation of rules should have been submitted to the jury. The violation of the rule constituted negligence subsequent to and independent of the question of defective safety appliance. Your petitioner was entitled to have this fact considered by the jury in determining the proximate cause of the injury.

These questions were all raised at the trial and were presented to the Minnesota Supreme Court on appeal.

They were preserved by setting them out as error in the motion for judgment notwithstanding the verdict or a new trial; by assignments of error to the Minnesota Supreme Court and by specifications of error to this court.

We seek in this court judgment for defendant notwithstanding the verdict for plaintiff, and, in the event that be denied, we ask a new trial be ordered.

SPECIFICATIONS OF ERROR.

I-a.

The Court erred in charging the jury as follows:

> "Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules." (Transcript, p. 188.)

I-b.

The Court erred in refusing defendant's requested instructions as follows:

> "Mr. Briggs: Will the Court extend that instruction so as to say that this question of

rules may be taken into consideration by the jury in determining whether the defective drawbar was the proximate cause of the accident?

Court: I don't believe that is the law as laid down by our Supreme Court." (Transcript, p. 188)

II.

The Court erred in denying the motion of defendant that a verdict be directed in its favor at the conclusion of the testimony and denying defendant's motion for judgment notwithstanding the verdict, it appearing as a matter of law that deceased's own negligence was the proximate cause of his death.

III.

The Court erred in submitting the case to the jury on the theory of a defective safety appliance.

III-a.

The Court erred in charging the jury as follows:

"The railroad company is made negligent as a matter of law in having a defective coupler; also, the fact that they were going to move the same on the track wouldn't be material at this time, or when this accident occurred." (Transcript, p. 186)

III-b.

The Court erred in charging the jury as follows:

"It is not disputed that at the time of the injury to Ring, defendant was moving and

hauling a certain car, the coupler and drawbar of which was defective." (Transcript, p. 186)

III-c.

The Court erred in charging the jury as follows:

"If you find that this coupler and drawbar was in fact defective, then the question for you to determine is whether or not this defect contributed in whole or in part as a proximate cause to the injury and death of Edmund Ludwig Ring." (Transcript, pp. 186-7.)

III-d.

The Court erred in charging the jury as follows:

"If you find that because of the defect deceased did go between the ends of the cars and did attempt to make the uncoupling, then you would determine whether or not the defect was the proximate cause of decedent's injury and death." (Transcript, p. 187)

III-e.

The Court erred in charging the jury as follows:

"If you find from the evidence that the coupler was defective and that such defect was the proximate cause of the injury to decedent, then the plaintiff is entitled to recover." (Transcript, p. 187.)

IV.

The Minnesota Supreme Court erred in failing to find error in each of the above quoted portions of the charge, all of which were presented to it on appeal.

V.

It was error for the Minnesota Supreme Court not to grant judgment for the defendant, or, in the alternative a new trial in which the errors complained of could be corrected.

ARGUMENT, POINTS AND AUTHORITIES.

I.

SPECIFICATION OF ERROR III AND SUBDIVISIONS.

THE FACTS DO NOT BRING THE CASE WITHIN THE SAFETY APPLIANCE ACT. THE CAR HAD COME TO REST ON THE SIDETRACK AND HAD CEASED TO BE "USED" AS CONTEMPLATED BY THE ACT.

As stated in a recent Federal case involving Section 2, Act of March 2, 1893, as amended 29 Stat. 85, and Act of March 2, 1903, 32 Stat. 943, "the association of the word 'used' with the words 'hauled or permitted to be hauled on its line' clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement."

McCalmont v. Penn. Ry. (1921), 273 Fed. 231.

Aff. 283 Fed. 736.

And this also is what the defendant contends is meant by the term "use."

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line at Budd. It was then chained up and hauled onto the sidetrack, to be cut out of the train. During this movement nothing occurred. The car was safely hauled to a place on the siding where it was to remain. Having so been placed on this sidetrack, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case. To illustrate our point we recite the facts and holding in the McCalmont case, supra. The defective car had been placed on a siding. It was chained to another car and deceased went between the cars to adjust the chain length without putting out a signal as required by the rules. While so doing another car was "kicked in," colliding with the defective car and killed the plaintiff's intestate. The Court there said:

> "In addition thereto it does not seem to me that the car which caused the injury was in use within the meaning properly to be given to that word under the Safety Appliance Act. The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it on a dead track and the hauling or the movement of it from that dead track to the repair place which is permitted to be done only at the risk of the defendant, had not yet begun, and was not then in immediate contemplation * * * he was merely making a temporary repair to the car upon the dead track so that at some future

time it might thus be moved or hauled. The law does not forbid or prohibit work upon a car on a dead track so as to put it into condition thus to be moved or hauled; nor does the law impose an absolute liability upon the interstate carrier for injury sustained by one engaged in doing that kind of work. In that situation and while doing that kind of work the applicable law, it seems to me, would be the negligence rules provided by the Federal Employers' Liability Act and not the absolute liability of the Safety Appliance Act.

For the foregoing reason I am of the opinion that defendant's motion (for judgment) should be granted."

McCalmont case, supra, at page 240.

Now, in that case, and in the one under discussion, the salient points are the same, in that in both the car was on the siding; the car was standing still; there was a defective coupler; the deceased was adjusting or uncoupling a connecting chain, and there was a violation of the company's rules governing the situation.

As in that case the car was out of service. It had ceased to be "used." If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law. If they hauled the car they violated the act, and if they did not haul the car they violated the act.

In *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441, a conductor was endeavoring to adjust a faulty coupler at one end of a string of cars when other

cars were shoved in on the same track and struck the one he was working on in such a way as to kill him.

In denying the plaintiff's requested instruction upon assumption of risk, the trial court said:

> "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads: 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Sec. 4."

The refusal of the requested instruction was sustained by this court.

We see no essential difference in the situation in that case and the one at bar. It cannot be that the company is without an alternative to avoid the absolute liability of the Act under these circumstances, whether it uses the car or sets it out. This car was no longer being "used" by defendant and had been placed on the siding to avoid using.

This case does not come under the Safety Appliance Act. It comes under the Federal Employers' Liability Act.

II.

Specifications of Error I, II, IV.

THE DEFECTIVE DRAW-BAR DID NOT PROXIMATELY CONTRIBUTE TO THE INJURY IN THIS CASE.

The question of whether a particular act is remote or proximate, is purely a question of law. The jury may have a function in drawing certain inferences and determining disputed facts, but where the facts are clear the court, through definite principles of law, determines the limits of proximity and does not leave it to the jury.

There are, ordinarily, four divisions of causes: The formal, the efficient, the material and the final. The formal and the final causes are metaphysical and we are therefore only concerned with the "efficient," that is, the active force, and the "material," the passive force upon which the active force operates. The causes of an event are all the preceding circumstances which brought the event to pass and they may be numberless. The consequences of an event, however, which still remain "efficient" are very few. The question is what is the final, sole, efficient cause, for this is the proximate cause and to it must be attributed the legal reason for the accident.

While the defective coupler under the law may have at one time constituted an active force, it had, prior to the accident, when the car had come to rest on the sidetrack, becomes a *passive* force. Each

time one or more active causes operates on a condition to create a new condition, a new causal step is taken, ending with a given result. This result is the direct result of the active force which last acted upon the immediately precedent condition, and is the indirect result of the earlier acting forces. *In other words, the subsequent coming into action of any other force is the direct cause of the result.* All other forces are indirect and at the time of the intervention become remote. The final active force must be the efficient cause which is more commonly called proximate.

A very plain illustration of the principle is found in *Gilman v. Central Vermont Ry.*, 107 Atl. (Vt.) 122. In that case a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not to be a proximate cause of the collision, but only a condition. This was so because the direct result of a passive force is not necessarily proximate, proximity of result following primarily the active line.

The most common way of enunciating the rule of liability is that the injury must be the natural and probable or natural and proximate result of defendant's act. A more accurate phrase would be that *the intervening force must be forceable, otherwise the result is made remote.*

A. THERE WERE THREE ACTIVE FORCES INTERVENING, WHICH, WHEN COMBINED, CONSTITUTED THE INTERVENING EFFICIENT FORCE AND OPERATED TO MAKE THE FAULTY COUPLER A REMOTE CAUSE OR CONDITION, TO-WIT:

1. Ring himself sent the brakeman, Quist, with directions to cut off the engine. It was in carrying out his direction that any motion of the train took place. Ring controlled the movement of the train (298-299-300).

2. In placing himself between the cars without notifying the engine crew, he knowingly and wilfully violated a rule promulgated for his benefit and his safety (264-265), which constitutes more than contributory negligence, and especially so in view of his instruction to Quist. Danger was not remote, but immediately imminent. The violation of this rule constitutes negligence. 18 R. C. L., Sec. 152.

Its relation to proximate cause will be discussed under the next subdivision of this brief.

3. Again, when the backward movement started, instead of stepping out from between the cars to a place of safety, as he could well have done, and as the conductor did (38 and 42), he swung his legs, then his body up and over the sagging chain, and by so doing deliberately invited death, or serious injury. The chain very naturally pulled taut when the movement ceased and he was caught between the chain and the draft rigging.

The statement contained in the opinion of the Minnesota Supreme Court with reference to Ring's further acts, after he had gone between the cars and the slow backward movement had commenced, is as follows:

> "* * * the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and *he swung his body up over the chain apparently to ride thereon* in the brief movement of the train, and the slack ran back—by the head cars stopping—and as the chain pulled straight, it squeezed the body of decedent between the chain, then under him, and the bottom of the draft timbers of the car above him." (596)

The evidence adduced by plaintiff does not present any reason or excuse for this action of Ring. Counsel for plaintiff thoroughly examined and cross-examined the conductor both on taking depositions and at the trial. Full opportunity was presented them to have the sole witness explain conditions that might have made this conduct reasonably necessary or at least excusable. The conductor testified that he walked back with the movement of the train while "*he* (Ring) *reached in and locked his arms around the axle of this bad order car* and this chain at the time was slack in there and wasn't unhooked, and he swung his body up over the chain. * * *" (38) Conductor O'Leary, the sole witness, says at folio 42, that "his idea would be to get out of there."

As stated above, the evidence discloses no palliative circumstances, but affirmatively shows a gross disregard of the consequences of his conduct by Ring.

Ring directed Quist to do what he did; Ring went between the cars immediately following the giving of this direction; Ring violated the company's rule as well as the common law rule by failure to give notice to the enginemen that he was going between the cars; and Ring omitted to follow the plainest line of conduct for his safety but got on the chain to ride. It seems plain that he effectively barred recovery on the ground that his own negligence was the proximate cause of the accident.

Brakeman Ring sent Brakeman Quist to cut off the engine and any movement that occurred resulted from carrying out this direction. Ring directed Quist as follows:

"Q. And then what did you do?

A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear? He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, I took it to mean that I should go in and go around with the engine.

Q. That expression?

A. *That means that, to go around about my business, to go up there and get into clear, and come back.*

Q. Cut off the engine?

A. Yes, cut off the engine and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir." (297-99)

Ring gave the order to Quist and *he thereby controlled the particular movement* that caused his death. Following the giving of this order he violated a fundamental rule that had been made for his guidance and safety by going between the cars without notice to the enginemen. He did this before his directions to Quist had been complied with and while a movement of the cars was imminent. When the engine was cut off, and in consequence thereof, the movement occurred. The fact that the conductor accompanied him when he went between the cars in no way relieves him from responsibility. The fact that a conductor was in charge of the train operates in no way to relieve Ring from his obligation to signal the engineer of his intent to go between the cars. The duty to give this signal rested on Ring whether he was in charge of the train or not. This obligation rests on all trainmen when going between cars in a train.

We are not trying to convert actual contributory negligence into proximate cause as has been contended by respondent.

The principles of causation have not been changed by any statute and remain as at common law.

> "It has been the policy of the common law to fix liability *in solido* with reference to the cause which stands closest to and in most immediate connection with the injurious result."
>
> 18 R. C. L. 156.
>
> See Ann. Cas. 1913 B. 791.

As it is said of compensation cases, the doctrine of *novus actus interveniens* always asserts itself in these cases, because it forms the basis of controversy, viz., the more immediate cause of the injury; but the weight of authority is to make the liability of the original actor depend upon whether such negligent or even wilful intervening act was foreseeable.

Pollack, Torts 37.

In addition to the rule of the defendant violated by Ring, the plaintiff is confronted with the following general common law rule: That a railroad employee when about to put himself in such a position with respect to a stationary car, if it should be moved unexpectedly, he would in all probability be injured, is bound to notify all other employes whose work may in its progress produce a movement of the car, or put out some signal which will show them where he is.

L. R. A. 1918 C., p. 380.

Illinois, etc., v. Winslow, 56 Ill. App. 462.

This rule, so far as we know, has universal support. In most of the decisions in which it is enunciated, however, recovery was denied because it was considered contributory negligence. Any court would, of course, rest its decision on this rather than take an unnecessary additional step to hold it the sole proximate cause. Comparatively recent statutory provisions have removed contributory negligence as a defense, and as yet but few cases have been passed upon as compared to the mass of decisions prior to the abolition of this defense.

The point we make is that merely because Ring's conduct constitutes contributory negligence, it does not bar proximate cause as a defense . Indeed it is in furtherance of it for it is but a step from contributory negligence to sole proximate cause and in view of the circumstances intervening, the one time negligence of the defendant became *remote* and at the time of the accident became the *occasion* which merely provided an opportunity for the intervening causal agencies to act; or it may even have set them in motion. The statute has not changed the rules relating to proximate cause.

The New International Dictionary says:

> "The *cause* of an effect is that which actually produces or brings it about; the *occasion* is that which either directly or indirectly provides an opportunity for the causal agencies to act or serves to set them in motion."

Whiting, J., says in *Fletcher v. S. D. Cent. Ry Co.*, 155 N. W. 3 (S. D.):

> "Under this statute where a railroad company failed to comply with the provisions of the Safety Appliance Act and such failure contributed to an injury suffered by an employee no act of the employee no matter how negligent it may be or to what extent it may in fact have contributed to the injury, can be urged as contributory negligence for purposes of defense. *Grand Trunk v. Lindsay*, 233 U. S. 42, 34 Supreme Court Reporter 584.
>
> But the negligent acts which are thus forbidden to be urged as a defense are those which in fact do merely *contribute* to the result. If an act of the employee is the *sole* cause of the result, it is not contributory, and the railroad company would not be liable therefor even under the provisions of the Employers' Liability Act. In this connection it is well to bear in mind the distinction between the *cause* of an act and the *occasion* for an act. An act may furnish the occasion for another act, and such second act may be the cause of any injury without the first act in any manner being a contributing cause of such injury; such second act may be the result of some intervening cause in no manner flowing from the original act, but which cause is given an opportunity to operate through the occasion furnished by such original act."

Counsel for plaintiff has cited a number of authorities in the court below holding that a rule not generally observed cannot be brought to life for a defense to a law suit. We call to the Court's at-

tention that there is not a scintilla of evidence of a single instance tending to show disobedience of the rule aside from the case at bar. From this the conclusion must follow that the rule was properly enforced and observed, and in any event this holding cannot be applied to nullify the rule of law so well established that going between cars without notice is negligence. Disobedience of law cannot be urged by the guilty party. The question of a wilful violation is infinitely important on the question of proximate cause, more especially that phase of it dealing with whether Ring's act was foreseeable by the defendant.

To illustrate the point where contributory negligence advances one step and becomes proximate cause, we cite *Kentucky, etc., Ry. v. Minton,* 180 S. W. 831.

In that case plaintiff undertook to repair a defective coupler on a car standing on the sidetrack, without putting out any signal that he was assuming a dangerous position. While in that position a string of cars was shoved in, moving the one upon which plaintiff was working, seriously injuring him. After reviewing the facts, the Court said:

> "We conclude, then, that under the facts and circumstances exhibited by the record, it was the duty of plaintiff to have observed the rule, unless same had been abrogated by some custom or usage ,or mode of conduct, or other excusing circumstances, in which all parties participated, *and his failure to do so constituted negligence on his part which was the sole producing cause* in law of his injuries."

And as in that case a rule which had not been abrogated by custom, usage or other mode of conduct was violated by Ring, resulting in his death. Wherein has the coupler played a part except as providing an occasion for his being there? A rule of law and a rule of the defendant's were both violated by Ring.

Great Northern Ry. Co. v. Wiles, 240 U. S. 444-448.

A drawbar in a freight train on which the deceased was rear brakeman pulled out, stopping the train. The deceased failed to guard the rear end of the train as it was his duty to do, but remained in the caboose. A rear end collision occured, killing the brakeman.

In reversing the appellate court, which had affirmed a judgment for plaintiff, this court said:

> "The pulling out of the draw-bar produced a condition which demanded an instant performance of a duty by Wiles—a duty not only to himself, but to others."

The Court then held that the negligence of Wiles was the sole proximate cause of the accident, and that his representative could not recover, even assuming the drawbar was defective.

In that case the deceased violated a rule by remaining in the caboose. In the case at bar the rule violation was effected in Ring taking his dangerous position between the cars without notice to the engine crew. All the more is this so in view of Ring's directions to brakeman Quist to do the very thing that was done.

The exact point involved in this case is well illustrated in the recent case of *Rittenhouse v. St. L. & S. F. Ry. Co.*, 252 S. W. 945 (Mo.). The syllabus reads:

> "Where a car repairman was injured immediately after placing himself in a perilous position between two cars on an active switching track, the fact that he failed to realize his peril did not relieve him of the duty to warn the crew of his intention to enter between the cars.
>
> *Held*, that his failure to warn the switching crew, and not the defective coupler, was the proximate cause of the injury by the movement of a third car."

The fact that Ring controlled the movement of the train is entitled to serious consideration by the Court. Illustrative of this point is the recent case of *Davis v. Hand*, 290 Fed. 73.

Hand was between the tender and an empty car endeavoring to effect a coupling. "On the third impact, the coupling made, evidently as the result of Hand having lined up or adjusted the couplings." Hand then signaled the engineer to go ahead and was caught and crushed between the cars and a coal shed which stood very close to the track. The Court said:

> "On the facts the plaintiff claims it is established as a matter of law that the Federal Safety Appliance Act was violated, and that such violation was the proximate cause of the accident and death of the deceased. It may be conceded that the reason the coupling was not made by impact on the first two attempts

was due to the failure of the couplings to work, either because of a misalignment of the drawbars or some defect therein and that after the first failure to couple, the deceased went between the cars for the purpose of lining them up, with the result the coupling finally made, as stated, on the third attempt. * * * In this class of cases the decision of this question only becomes material, if the alleged defects in the couplings, and the consequent violation of the act, was the proximate cause of the resulting accident."

After finding the coupling had been made, the Court goes on to say:

"It then became his duty to give the engineer the signal to move out, in such a manner and from such a position as he might elect. * * * He had the option to place himself in a safe position, either by climbing up onto the car, or by crossing to the far side of the track from the coal bin, and going forward to the engine. It is clear from the evidence that he deliberately took the most dangerous position, and gave the signal that resulted in the train going ahead and crushing him between the coal car and the bin. * * * Wherever he was, it was of his own choosing. No claim is made that the deceased was unfamiliar with his surroundings, or that he was engaged in an operation that was new to him."

The Court held:

"The proximate cause was the deceased's carelessness in placing himself in a dangerous position to give the signal, when he could have placed himself in a safe place before so doing.

> A new and intervening cause was set in motion by the deceased himself after the coupling had been made, and the necessity for his being between the cars, or in the position he was in had ceased."

In this case Hand gave the signal that moved the train. In the case at bar Quist gave the signal at Ring's direction, and so in effect it was Ring's signal.

A good illustration of a defective appliance providing an *occasion* for an accident and not being the proximate cause is found in *Phillips v. Penn. R. R.*, 283 Fed. 381, which was decided by the Circuit Court of Appeals, Seventh District, and commented on in *Davis v. Hand*, 290 Fed. at pages 77-8, as follows:

> "There the plaintiff, a locomotive fireman, went forward over the boiler to repair a defect in the automatic bell ringer, which under the law was negligence per se. On his return, and when stepping over the steam dome, the safety valve popped, causing him to lose his balance and fall. The safety valve popped because it had reached the pressure for which it was set. It was well said that the plaintiff would not have been in the position he was, except for the defect in the bell. But the Court held, that the defect was not the proximate cause, as Phillips knew the safety valve would blow at a certain pressure, and also whether it was likely to do so or not, as he was in charge of the fire."

In the case at bar it is plain that the deceased, Ring, would not have been in the position he was

except for the defect in the coupler. Beyond this there is no connection between the defective coupler and his injuries. As in the case last quoted, Ring knew whether the train was likely to move or not as he gave the direction which resulted in the movement. For the purpose of this case he was in charge of the particular movement that occurred even though he was not conductor of the train.

In the respect that Ring knew or should have known that the cars might move this case is similar to that of *Kemp v. D. L. & W.*, 122 Atl. 731 (N. J.), where a brakeman who had been informed of the movement cars would take, stood on the track over which the cars were to pass, although no duty required him to do so, was struck by the cars and killed, it was *held*, that the failure of the railroad company to have a man stationed on the leading car to give warning was not the proximate cause of the employe's death.

The case of *Douglas v. Washington Terminal Co.*, 298 Fed. 199, involves the same principle as the one at bar. In that case a brakeman at a car inspector's request signaled the engineer for slack so that the train could be divided and the inspector not having set the brakes on the rear section, the rear section drifted backward about 3 feet from the front section. The brakeman attempted to cross the track between the two sections. He was caught and crushed. The Court held, that the brakeman's movement across the track was an intervening proximate cause between the failure to set the brakes and his death.

> "With respect to the first of these charges we may say that the drifting movement of the rear section was not in fact or law the proximate cause of Douglas' injury, since a new and independent cause, to-wit, Douglas' movement across the track, intervened between the two events, and became the efficient and proximate cause of the injury. Therefore the plaintiff was not entitled to recover upon that ground."

In determining proximate cause it is immaterial whether the negligence be a violation of the Safety Appliance Act, failure to set brakes, or any conduct on the part of the railroad company, which in law amounts to negligence.

An analogous situation arose in *Patterson v. Director General*, 105 S. E. 746 (S. C.). In that case plaintiff, a yard conductor, was injured while operating a defective engine in violation of a rule forbidding the operation of engines by conductors. The following language expressed the opinion of the Court:

> "The purpose, importance and good sense of the rule forbidding him to do so were as obvious as was his duty to obey it. There was no reason or excuse, for his violating it; and however much we may sympathize with him in his misfortune we are constrained to hold that his conduct, whether it be called negligence or assumption of risk, absolves the defendant from liability for his injury."

And thus the violation of a rule was held the proximate cause of his injury.

B. THE PROBABILITY THAT AN INJURY WOULD BE CAUSED BY THE ALLEGED VIOLATION OF THE SAFETY APPLIANCE ACT WAS SO UNLIKELY, UNDER ALL THE CIRCUMSTANCES, THAT IT COULD NOT REASONABLY BE FORESEEN.

Was Ring's act in assuming this dangerous position under the circumstances of this case reasonably foreseeable by Quist or the enginemen drawing the train? They had been directed by Ring to do what they did do with no word or signal from Ring that he was going between the cars. They had a right to understand he was not between the cars. So understanding they were not negligent.

When the company lays down common sense rules for the protection of its employees may it not rely upon their observance, as the natural course of events? The rule book in this case provided as follows (267-268):

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed, before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."
>
> (Ex. 26, Folios 267-268.)

That this rule was not complied with is evidenced by the testimony of Engineer Flower (268):

"Q. Did you get any information that

either Mr. Ring or Mr. O'Leary were between the cars?

A. No, sir.

Q. Did you have any knowledge at the time this uncoupling took place of your engine that anybody was between the cars?

A. No, sir."

And also by the testimony of Brakeman Quist, who was the only one through whom such signal could be given:

"Q. Did you know at that time that Ring was between the cars or in the train?

A. No, sir, I had no way to know it.

Q. Had you received any signal or warning that he was there?

A. None whatsoever.

Q. And you were following out his instructions when you cut the engine off and came around?

A. Yes, sir." (305.)

Because of the rash act of the deceased in omitting to notify or signal the engineer of his intended move, the latter was warranted in beheving it was safe to uncouple the engine from the train, especially on the orders of a brakeman sent there for that specified purpose by the deceased,—Ring. Quist had been ordered there to handle the engine, to direct the engineer in pulling in on the siding *and thereafter to cut off the engine and "come around."* To do so required slack, and this was well known to the deceased. He also knew the grade conditions.

This rule was made for the protection of the employees—each relies on the other's observance. It is one of the most valuable and beneficial rules promulgated by the company. There is no evidence of its disregard. Its observance constituted the very essence of safety and protection to fellow workers. It is not a rule that could be said to be in conflict with the law, but is in furtherance of the law—bringing home to men working side by side the duty imposed upon them by common prudence, and by the law without a rule.

The proximate consequences for which a defendant is liable are restricted to those which should reasonably have been foreseen, and we submit defendant was not required to foresee this grossly negligent conduct of Ring. To impose such a duty would be to impose the impossible. The coupler was out of use. The movement of the train was one of the causes of the accident. Ring's instructions to Quist was another, and Ring's violations of the rule was a third. All of these causes intervened after the coupler defect. The defective coupler, as stated, only provided the occasion.

Quoting from *San Antonio, etc. Ry. Co. v. Behne,* 231 S. W. 354 (Tex.):

> "*The causal connection between the negligence which put in motion that agency, and the injury, is not controlled by the fact that the agency acted directly upon the injured party.* The causal connection was broken in contemplation of law, by the intervention of disconnected and independent agencies

brought into being by a chain of circumstances so improbable as to render them in law unforeseeable."

As stated in *Peterson v. Martin,* 138 Minn. 195:

"* * * It is a well settled rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote."

The violation of the Safety Appliance Act, if any, had spent itself when the cars came to rest and was at most only reflected in the physical setting which the cases describe as the "occasion" or "condition" of the injury, as distinguished from its proximate cause.

We submit, in concluding this section of the brief, that the injury, under the evidence cannot be attributed to a violation of the provisions of the law, but only that, it provided the occasion for the accident. In other words, an attempt to apply the "but for" rule is made by the respondent. That rule has never been followed for it involved the tracing of endless conditions and circumstances too devious for the courts to follow and administer substantial justice.

III.

Specifications of Error I-a and I-b.

THE QUESTION OF DECEASED'S VIOLATION OF RULES SHOULD HAVE BEEN SUBMITTED TO THE JURY. THE COURT ERRED IN REFUSING DEFENDANT'S REQUESTED INSTRUCTION.

The trial court refused to submit the question of deceased's violation of the rules for any purpose, even as bearing on the question of proximate cause. He attempted to leave to the jury the question of proximate cause in a general way and refused to permit the jury to consider the violation of this rule in that connection, saying, "I don't believe that is the law," and his ruling was sustained by the Minnesota Supreme Court.

The charge of the Court is in effect a withdrawal of the question of proximate cause. For the Court says, "that the decedent violated those rules, would not be a defense to the company, or defendant." Manifestly one of the causes of this accident was the violation by Ring of this rule. The Court tells the jury that this negligence of Ring's is no defense, which is equivalent to saying *his* negligence cannot be the proximate cause. This is said to the jury in such a plain and emphatic way at the conclusion of the charge and just as the case went to the jury, that it carried great weight. It was done by the Court with full and fair knowledge of the contention we now make. All that had previously been said about proximate cause was nullified.

We quote the following colloquy between Court and counsel:

"Court: Are there any suggestions, counsel?

Mr. Davis: I would ask the Court to charge the jury that if they in fact had a defective coupler, that if a rule was violated it was no defense and cannot be considered by the jury. The rules was introduced in evidence and goes to the jury, and for that reason plaintiff would ask the Court to charge the jury that if they find that defendant had a defective coupler and that that was the proximate cause of the injury, that they cannot sider the violation of any rule introduced, as that was no defense in this case. (535)

* * * * *

Court: Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules. In other words, that acts of the plaintiff are no defense unless the act was the sole cause of the injury. (537)

Mr. Briggs: Will the Court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective draw-bar was the proximate cause of the accident?

Court: I don't believe that is the law as laid down by our Supreme Court.

Mr. Briggs: The Court understands that our contention is that the defective draw-bar

was not the proximate cause of the accident, and therefore that this rule should be taken into consideration of what that proximate cause was." (538)

With reference to the making of rules it is said:

"Not only has an employer a strict legal right, but there rests upon him a legal duty as well to promulgate rules and regulations for the guidance and protection of person who may engage in his services. There is correlatively an obligation resting upon employees to yield obedience to all proper rules and orders; and if an employee sustain an injury by reason of a violation of the employer's regulations, orders or commands, he will be barred of all right of recovery from the employer on the score of the latter's negligence" * * *

"Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."

18 R. C. L., Sec. 152.

See Ann. Cas. 1912 A. 91 (85).

"Where the evidence is conflicting the question of whether the violation of the rule was or was not the proximate cause of the injury is properly submitted to the jury."

Hampton v. Chicago, etc., R. Co., 86 N. E. 243 (Ill.).

And putting it conversely:

"The violation of a rule by an employee where such violation is the proximate cause of the accident is negligence as a matter of law."

Fernette v. Pere Marquette Ry., 141 N.W. 1084 (Mich.).

There can be no doubt but what under certain conditions the violation by a servant of a regulation adopted by the master for the safety of the servant is negligence *per se* on the part of the servant.

G. N. Ry. Co. v. Hooker, 170 Fed. 154.

And such violation always goes to the question of negligence whether due to thoughtlessness or willfulness.

Gleason v. Detroit, 73 Fed. 647.

Lake Erie, etc., v. Craig, 80 Fed. 488.

In speaking of compensation cases, where even more strict liability is imposed, it is said:

> "Violations of rules designed to safeguard the employees is generally held, as a matter of fact, to constitute wilful misconduct, and to debar the employee, or his dependents, in case of death, from any right to recover compensation."
>
> 4 A. L. R. 119, note.

There can be no question but what the rule involved was reasonable and promulgated in aid of, to protect, and to benefit employees. It is not in opposition to any rule of law and was entitled to observance. In a case involving a similar rule the Court held it reasonable "and should be obeyed."

Bowers v. Atchison, etc., 107 Pac. 777 (Kas.)

Plaintiff claimed we are "resurrecting" this rule as a defense. To use such a term is a sheer mis-

statement of the evidence and of the law. We maintain that it cannot be arrogated to a place of no importance and excluded from the jury in considering whether the unfortunate result is the proximate effect of a faulty coupler.

We have shown by numerous citations from cases and encyclopedic works that violation of the rule constitutes negligence from whatever angle it is viewed. It follows that if it is evidence of negligence it must be considered together with the other acts of negligence, and the other intervening circumstances, to fairly determine proximate causation. Even aside from the other two intervening agencies we had a right to have this question submitted to the jury, for

> "Ordinarily the question whether his disobedience was the proximate cause of the injury is one for the jury's determination."
>
> 18 R. C. L., Sec. 152, and cases cited.

The Court below not only refused defendant's requested instruction that the rule *might* be taken into consideration in determining proximate cause, but affirmatively charged the jury that it *could not* be taken into consideration. (537-538.) And it thereby committed error that only a new trial can remedy.

Our contention is that petitioner had an absolute right under the Federal law to have *all* evidence of negligence considered by the jury in this respect, and the fact that this right was denied is assigned as error.

Conclusion.

Petitioner contends that it is entitled to judgment, on the ground that the negligence of Ring was the sole producing cause in law of the accident and that the defective coupler merely served as the occasion, providing an opportunity for the causal agencies to act, or at the most to have set them in motion; and on the further ground that the facts do not bring the case within the safety appliance act.

If this Court shall be of the opinion that petitioner is not entitled to judgment, then a new trial should be granted, on the grounds stated in the next preceding paragraph; that the decision of the Minnesota Supreme Court is erroneous; that petitioner has been deprived of rights given it under the Federal law; that the decision is at variance with the holdings of this Court and other Federal Tribunals; that erroneous directions were given to the jury and competent evidence as to negligence of deceased in violating rules and the application of this evidence as to proximate cause was excluded from consideration by the jury.

Respectfully submitted,

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WM. R. STANSBURY
CLERK

No. 428 422

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, as Special Administrator of the Estate of EDMUND LUDWIG RING, Deceased,
Respondent.

REPLY BRIEF.

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REPLY BRIEF.

To make our position clear and to reply to parts of respondent's brief, we wish to make this short reply.

There is, in fact, little controversy over the evidence. Some conclusions drawn from it are divergent.

Respondent says in his brief, page 20:

> "The fact is that the train *at the time* was *standing still* and there was *no movement contemplated until the engine was brought around to the rear of the train.*"

Again at page 36:

> "*Ring did not expect or contemplate any movement* of the cars *while he was between the ends thereof.*"

Again at page 42:

> "The train in question was standing still and there could be *no movement* of the train except upon the direction of the conductor, O'Leary."

Again on page 13:

> "The train came to a stop on the sidetrack.
>
> "After the train came to a stop on the sidetrack the brakeman, Quist, does not claim, nor does anyone else, that Ring told him to *move a car.*"

Counsel complain because petitioner argues that the car was not *in use* at the time of the accident although that argument is based on what they now so earnestly urge are established facts.

It is not essential that there shall be an intention not to move a car, *for any specified length of time,* to take it out *of use.* If there must be a certain length of time, how long must it be? The controlling factors must be the conditions existing at the very time of the accident. The time may be ever so short, or ever so long, if it cover the time of the accident.

It is not necessary that the car shall be standing alone and not coupled to other cars for it to be taken out of use.

It is not necessary that the car must be on a repair track to be out of use.

If the facts are as stated by respondent—then at the very time of the accident—from the time the train came to a stop on the sidetrack and until the engine should come around to the rear of the caboose—there was no intention or necessity to move this car; and *for that period of time it was out of use.*

In *McCalmont v. Penn. R. R.*, 273 Fed. 231, the car was on a sidetrack. It was to be taken to a repair track. McCalmont and a helper were shortening a chain coupling the car with the defective coupler to other cars. It was not expected then to move the car. Another car was shunted on the same track and McCalmont was killed. In this case, Ring, with the conductor, was unhooking the coupling chain on the car. It was not expected to be moved. In each case the car was on a sidetrack; each was coupled by chain; the injured person was in a dangerous position in violation of rules; each car was standing still with no intent or necessity to move it; each car was moved; each employee was killed when working on the coupling chain, the one to shorten the chain, the other to uncouple.

The Court in the McCalmont case held the car was not in use. The Circuit Court of Appeals (Sixth Circuit) sustained the holding. The Supreme Court denied a writ of certiorari January 22, 1923, and approved it in Davis vs Wolfe, Nov 12 1923

The question may be asked, can a car be said to be out of use when it is still in a train, even though it may be the intention that it shall not be hauled further in that train?

We do not think it is a question of the kind of sidetrack on which a car may be, or how it may be coupled up with other cars. It is a question, rather, of what its status is in relation to its own *use*. What is to be done with it? Respondent tells us that at the moment of the accident there was no intent to move this car and therefore no intent to then use it. Upon his own contention the car was not in use.

In the *McCalmont* case the car had not reached the repair track. In this Ring case the car had been discontinued in use as a part of the train. They were cutting it out of the train, the very first necessary act after abandoning its use.

But to our minds a far more important and clearer question than whether the car was in use is, What was the proximate cause? If there was, or if there should have been, in contemplation, a liability that this car might be moved by the uncoupling of the engine when the train was on the grade, or be moved by any other means, then the proximate and sole cause of the accident was Ring's own negligence. We will also see that even though the car was unintentionally and unnecessarily moved, that Ring's negligence was the proximate cause of the accident, or the movement itself was the proximate cause of the accident. And the fact of the existence of a defective coupler only furnished the occasion.

A very clear discussion of proximate cause as applied to this class of cases is found in *McCalmont v. Penn. R. R.*, 283 Fed. 740-1. This case is

almost a duplicate of the McCalmont case. The language is as follows:

> "It is quite apparent that the defective coupling was not the direct cause of McCalmont's injury in the same way and to the same degree as in cases where a brakeman is actually trying to make a coupling with a car *which is at the moment coming on for that purpose:* yet there was a seeming cause and effect relationship from the fact that, except for the defective coupling, McCalmont would have had no occasion to go between the cars at this point and would not have been hurt. We think the properly logical view of such situations, and the authoritative precedents to be discussed, fairly indicate that *such accidents fall into two classes—the one where the impact of the two cars which injures the workman is a part of the movement in which he is purposely participating; the other where this impact is rather a collision which is no part of the plan.* In the former class nothing happens which was unintended or which should have been avoided. The presence of the injured person between the cars is the immediate cause of the injury, and that presence was induced by the defective coupling, which is, therefore, in law, the proximate cause. *In the other class of cases the unintended and unnecessary collision is the immediate cause of the injury, the presence of the injured person at the danger point is an incident or a condition, and we must, therefore, look to see whether the defective coupler is the cause of the collision. If so, then it is the proximate cause of the injury; otherwise it is a remote cause."*

In no way did the defective coupler cause the "collision," or movement, of the train. It was the release of the air and the uncoupling of the engine both at the head of the train, at the upper end of the grade and nearly 40 cars from the defective coupler, that caused the backward movement of the cars.

The following language used in the opinion in the same case at page 741 is so clearly applicable to this case and so well expressed that we quote it:

> "If, however, there were otherwise doubt about the conclusion that the defective coupler was not the proximate cause of McCalmont's death, it would be removed by observing and applying the ruling of the Supreme Court in the *Wiles Case*, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732. This opinion points out that even in the presence of negligence by defendant which set in motion the train of events and without which the injury would not have happened, yet *the plaintiff's own conduct and negligence may be such as to become the intervening and sole proximate cause, leaving the defendant's negligence as a remote cause only.* Upon its facts as they are assumed by the Supreme Court, we cannot distinguish that case from this. It is true that the right to recover was not planted upon the Safety Appliance Act, but upon negligence under the Employers' Liability Act, and that any contributory negligence on the plaintiff's part would have diminished the recovery under the Employers' Liability Act (Comp. St. No. 8657-8665) rather than have been wholly immaterial under the Safety Appliance Act; but the court was not deciding the effect of contributory negligence,

but only whether the plaintiff's conduct was contributory negligence or was the sole proximate cause. It could make no difference whether the defendant's negligence in permitting the train to break apart and thus bring Wiles into a place where he was in danger and was killed, was a disputed inference which a jury might draw under the one act, or a presumption of law which must be indulged under the other act. The Supreme Court assumed (240 U. S. 448, Sup. Ct. 408, 60 L. Ed. 732) that there might be negligence, actionable under the Employers' Liability Act, which thus brought Wiles into the position where he was exposed to the danger of an unintended collision, just as the absence of the necessary coupler brought McCalmont into a similar position. Wiles knew, as McCalmont did, that in the regular and ordinary operation of the road such a collision as did take place was *liable* to occur at any moment. *It was Wiles' clear duty, as it was McCalmont's, to take a certain prescribed step which, if taken, would prevent the collision. In each case there was neither negligence in bringing about the collision nor cause for the collision, except the failure of the man hurt to take that step which it was his duty to take to protect himself and others. If Wiles had gone back with his flag, as his duty required, that collision probably might have been avoided. If McCalmont had set out his flag as his duty required, it is even more probable that there would have been no collision. Our affirmance of the judgment below could safely be rested on the Wiles Case alone."*

We may add, if Ring had warned the enginemen that he was going between the cars he would not have been injured.

McCalmont was engaged in *coupling* the cars *by shortening the chain.* Ring was engaged in *uncoupling the cars.* The Court in the McCalmont case uses the following language in discussing this feature:

> "We do not overlook the insistence of counsel that McCalmont was actually engaged in coupling the bad-order car to its neighbor, and that hence all doubt is removed. To say this is to beg the question. To chain together two cars which have stood for hours and may stand for hours more untouched upon a track unused save as a receiving station for the car hospital is, of course, in a certain broad sence, to 'couple' them; but the word usually describes the operation which accompanies the approach of one car to the other. A crushing impact is the expected incident of the normal coupling, and safeguards are constantly necessary; not so, necessarily, of a 'coupling' which calls for no impact."

No impact was contemplated or occurred in either of these cases.

Respondent makes extended argument (see page 17 of his brief) that the movement of the cars was unnecessary and unintended, that this unnecessary and unexpected movement of the train caused the injury. This brings the case squarely within the rules laid down in the McCalmont case and the decisions of this court therein referred to. The

facts we have before us are analogous to the collision cases. The same rules of law apply.

In *Lang v. N. Y. Cent.*, 255 U. S. 455-461, the following sentence is applicable to our case:

> "Or in other words, and as expressed in effect in the *Conarty case*, that the collision under the evidence cannot be attributed to a violation of the provisions of the law, but only that had they been complied with it (the collision) would not have resulted in the injury to the deceased."

On the other hand, if the running back of the slack in the 40 cars in the train was the natural or "liable" result of cutting off the engine which Ring had directed Quist to do, Ring's negligence in giving that direction and then placing himself in a dangerous position, contrary to the Company's rules forbidding him from doing so without first *knowing* that the enginemen had understood and obeyed signals which he was bound to give to advise the enginemen that he was going into a dangerous position, constitute the sole proximate cause of the accident. For Ring went into the dangerous position without even attempting to give any warning to the enginemen. He did this after he had directed the doing of the very thing that caused the accident, viz.: cutting the engine off the train.

Whether the cars ran back unnecessarily and unintentionally, or whether they ran back as the result liable to follow doing the thing intended and directed, the absence of liability still remains the same.

From whatever point we view the situation, the defective draw bar was only the *occasion* for Ring being where he was and in no sense was it a *contributing cause* of the accident.

This action is based on the Safety Appliance Act. The only negligence was the defective draw bar. No other negligence is claimed or pleaded. Recovery must be had under that act, or not at all, as the case now stands. Any view we take we find plaintiff barred from recovery.

The *Otos Case*, 239 U. S. 42, is quite different from this Ring case. Otos went between *moving cars* to uncouple them. There was a rule forbidding such action. The Court says in 128 Minn. 286:

> "There is evidence that in this yard it (the rule) had, with the knowledge of the yardmaster, been more honored in its breach than in its observance."

In this Ring case there is not one word of evidence of any breach of the rule to warn enginemen before going into a dangerous position. Ring did not go between moving cars to uncouple as did Otos. The Otos cars were being operated and no other negligence was shown than the defective coupler. Otos was not violating any effective rule.

The Otos case presented none of the questions arising in this Ring case.

Counsel mistake our position by assuming that we contend that the defective coupler must be the sole proximate cause of the accident. That is not

our understanding of the law, and we have not intended to use language that is subject to such construction. If there shall be any doubt about our position we believe that doubt will be cleared by this restatement.

Counsel urge a decision on this question and on the question of statutory change of the common law rule governing proximate cause. These rules seem to have been heretofore stated by this court, but the rule has not been stated as counsel would have it.

The Court refused to permit the jury to even consider the rule Ring violated. (See pages 34-35 of our brief and folios 537-538 of the Record.) The Court charged:

> Court: Plaintiff has asked me to instruct you that the fact that the company had rules, which rules are in evidence, and that the decedent violated those rules, would not be a defense to the company, or defendant. That, I believe, is a correct interpretation of the law, that will not be a defense, the fact that he violated those rules. In other words, that acts of the plaintiff are no defense unless the act was the sole cause of the injury. (537)
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> Mr. Briggs: Will the Court extend that instruction so as to say that this question of rules may be taken into consideration by the jury in determining whether the defective draw-bar was the proximate cause of the accident?
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> Court: I don't believe that is the law as laid down by our Supreme Court.
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> Mr. Briggs: The Court understands that our contention is that the defective draw-bar

was not the proximate cause of the accident, and therefore that this rule should be taken into consideration of what that proximate cause was. (538)

Respectfully submitted,

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No. [redacted]422

Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

TOM DAVIS AND ERNEST A. MICHEL,
Counsel for Respondent,
Minneapolis, Minnesota.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

Supreme Court of the United States.

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The above entitled action resulted in a verdict in favor of the administrator. The motion for new trial was denied by the trial court, and upon appeal the action of the trial court was affirmed by the Supreme Court of the state of Minnesota.

Decedent was injured while between the ends of two cars, which were chained together. The draw bar of one car had pulled out. The cars were being moved to the side track.

There was no question but that decedent and the railway company were engaged in interstate commerce.

While between the cars so chained together, because of a movement thereof, decedent sustained injuries from which he died.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

This case involves only an appreciation of all the facts, and the question of whether from such facts liability follows:

There is nothing for the Supreme Court of the United States to pass on.

See *Great Northern R. Co. v. Knapp,* 240 U. S. 464, 36 S. C. 399, 60 L. Ed. 745, and similar cases.

As to liability, the case falls squarely within the cases of which *Great Northern R. Co. v. Lunch,* 239 U. S. 349, 36 S. C. 124, 60 L. Ed. 322, and *San Antonio, etc. R. Co. v. Wagner,* 241 U. S. 476, 36 S. C. 626, 60 L. Ed. 1110, are typical.

The case involves no construction of the Act of Congress, and all the questions involved in the case were purely for determination by the state Supreme Court.

Both the state Supreme Court and the District Court upheld the contention that liability had been clearly established under the Safety Appliance Act because of the hauling and moving of the cars so chained together.

This was a plain violation of the Safety Appliance Act, and the petition for writ of certiorari should be denied.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Counsel for Respondent,

Minneapolis, Minnesota.

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A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

MOTION OF RESPONDENT TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET AND BRIEF IN SUPPORT THEREOF.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

MOTION TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes the above named respondent and moves this court:

1st: That the writ of certiorari granted herein to review the judgment of the Supreme Court of the State of Minnesota be dismissed, on the ground that said writ was improvidently granted, and on the ground that facts essential to an adequate appreciation of this cause were not brought to the attention of the court by the petition for writ of certiorari herein.

2nd: In the alternative, respondent moves the court that the judgment of the Supreme Court of the State of Minnesota, be affirmed because the questions upon which the decision of the cause depends have been determined by many decisions of this court, and said questions are so well settled as not to need further argument, and on the ground that

the case involves no question of statutory construction, but only an appreciation of the facts and the question of whether liability follows therefrom.

3rd: That the judgment of the Supreme Court of Minnesota be affirmed on the ground that the petition for writ of certiorari herein was sought for purposes of delay only.

4th: In case none of the above motions be granted, then the respondent moves the court that this action be transferred for hearing to the summary docket because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys of Record for Respondent,
Minneapolis, Minnesota.

SUPREME COURT OF THE UNITED STATES.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

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Respondent.

NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 6th day of October, A. D. 1924, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this 11th day of August, 1924.

Asa G. Briggs
.....,
Attorneys for Petitioner.

STATEMENT OF THE CASE.

This action is one to recover damages for the death of decedent, Ring ,a brakeman employed by the defendant in interstate commerce.

The plaintiff had a verdict in the District Court. That court denied the motion of the railroad company for judgment *non obstante* or for a new trial.

The railroad company appealed to the Supreme Court of Minnesota, and that court in all things upheld the trial court, affirming the verdict.

Judgment was thereafter entered, which is in all things, final, and to review that judgment, a petition for writ of certiorari was granted by this court.

Respondent contends:

(a) That the writ was improvidently granted because this court was misled as to the facts.

(b) That the case is of a character which this court should not review.

(c) That the filing of the petition for the writ results in an unnecessary delay, inasmuch as the questions involved have been settled by the many decisions of this court.

THE UNDISPUTED FACTS.

(Figures in parenthesis refer to folios of the printed record on file in this court.)

On October 4th, 1922, decedent, Ring, was working for the railroad company as a brakeman at Budd, Iowa. The freight train, upon which he was employed, had just pulled into the Station of

Budd. It was there discovered that the draw-bar on one of the cars was defective; in fact, it had pulled out (33).

Interstate Commerce Conceded.

There was no dispute but that the train was interstate in character.

Conductor in Charge of Train.

The conductor in charge of the train was J. P. O'Leary. Decedent Ring and one Quist were brakemen. The conductor had charge of the train. Quist and decedent worked under him.

Car Used With Defective Draw-Bar.

When it was discovered that the draw-bar was defective, the train crew intended to take the defective car to a side track at this station. Decedent was killed *before the car had reached its destination.*

The conductor, O'Leary, testified as to the work being done as follows:

> "Q. And where did you discover this car with the draw-bar pulled out?
>
> A. We stopped to head in at Budd to meet an eastbound train and in starting we pulled the draw-bar out.
>
> Q. The draw-bar was pulled entirely out?
>
> A. No; the timber was broken and it allowed it to pull out half way out" (33).

It will be noticed that the crew were not dealing

with a car on a dead track. They were going to head into a side track to meet another train.

DECEDENT WORKED UNDER INSTRUCTIONS OF CONDUCTOR.

The conductor, O'Leary, testified further:

> "A. I sent this brakeman, Ring—the train stood on a reverse curve at the time,—and I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side track.
>
> Q. And after that what was done?
>
> A. Well, we done that. We backed up and put the chain on this car and pulled the rear end of the train into the side track.
>
> Q. And did Ring *act under your directions* in helping to chain up the draw-bar of this car?
>
> A. *Yes, sir*" (33-35).

It is to be noted that Ring was acting under the direction of a superior officer in helping to chain the defective car. The defective car was to be hauled to a side track and then was to be switched out of the train. There was no evidence in the case that the car had come to rest on a dead track.

After the men got the car chained up so they could move it, the evidence showed:

> "Q. And then you pulled it up on the side track?
>
> A. Yes.
>
> Q. After you did that, did you have *any other work* with regard to this draw-bar?
>
> A. Yes, I told Ring, and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

It will again be noted that the work of moving the defective car was *not completed.* It was to be taken and switched out of the train. During all this time, Ring was was working under the directions of his superior, the conductor, in assisting in moving this defective car. The evidence of the conductor on this question is as follows:

> "Q. And did Ring have anything to do with this draw-bar after you got it into the side track?
>
> A. After we got on the side track I was in the rear end of the train and Ring was up by this car that had the draw-bar out and I got out and walked up to a car length from where he was and *I asked him* if he could unhook the chain and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (35-36).

After decedent was unable to unhook the chain, the conductor further directed his movement and attempted to assist him.

> "Q. And then what happened?
>
> A. And I told him to let me try it, and I couldn't unhook it. It was a heavy chain and one man couldn't handle it, and he climbed over the end of the car and got on the other side, so I was on one side of the draw-bar and he was on the other, and he was facing the east and *he reached down to lift up the chain to give the slack to me* so I could pull the chain, and the train backed up" (36-37).

While the men were between the cars attempting to manipulate this chain so that the defective car might be moved and taken out of the train, the train backed up without any signal.

"Q. And what happened to Mr. Ring?

A. I straightened up and walked back with the movement of the train and he reached in and locked his arms around the axle of this bad order car and this chain at the time was slack in there and wasn't unhooked, and he swung his body up over the chain and held back and the slack ran back and squeezed him between the chain and the bottom of the draft-timbers of this car.

Q. Now, then, when this train jerked back, you and Ring were both in there trying to unhook this chain?

A. Yes" (38).

The conductor made no claim, nor was any claim made by any one, to the effect that he was not in charge of the train, and decedent worked under his orders.

"Q. *And you were in charge of the train as conductor?*

A. *Yes, sir.*

Q. And you gave no signal to back up?

A. No" (39).

The testimony of the conductor was *not disputed* at the trial.

Defect in Draw-Bar Conceded.

There was no claim by the railroad company that the draw-bar was not in fact defective.

Neither did the defendant deny that the car with the defective draw-bar was being hauled to the side track by means of chains.

The Supreme Court of Minnesota held that the

hauling of the car to the side track and its movement there constituted a violation of the statute.

The opinion was written by Chief Justice Wilson, who stated the facts to be as follows:

> "The deceased was working on an interstate train which, on arriving at Budd, Iowa, undertook to take a siding and meet an east bound train. The switch was thrown and in starting the train to pass on to the side track a drawbar pulled out, permitting the train to separate. The crew consisted of the conductor, decedent, another brakeman and the engine men. The train was backed up to the cars which had broken loose. The front car of the portion of the train which had broken loose was coupled with a chain hooked on its front axles with the car ahead so as to pull the rear part of the train off of the main line onto the siding. Decedent *under direction of the conductor* aided in this work. The train was pulled onto the side track and brought to a stand still. The plan was *to switch the defective car* out of the train. This was in the night time. The conductor asked decedent if he could unhook the chain and he replied that he did not know, but set his lantern down, and tried and replied that he could not do it. Then the conductor tried it. The chain was heavy and one man could not handle it. Decedent got on the other side of the chain and reached down to lift up the chain to give the slack to the conductor so he could unhook the chain. The brakeman, Quist, uncoupled the engine from the train for the purpose of permitting it to go out on the main track and to the rear of the train so as to get that part of the train back of the defective car and when this uncoupling was made the disconnected portion having the air brakes released and perhaps started by the movement of

the engine, moved back, but Quist caused the air to be applied and thereby stopped the movement. The train backed up without warning and the conductor straightened up and walked back with the movement of the train. The decedent, however, reached in and locked his arms around the axle of the bad order car and the chain at the time was slack and was not unhooked, and he swung his body up over the chain, apparently to ride there on in the brief movement of the train, and the slack ran back —by the head cars stopping—and as the chain was pulled straight, it squeezed the body of decedent between the chain, then under him, and the bottom of the draft-timbers of the car above him. This so injured decedent that he suffered severe pain until his death, fifteen days later" (592-597).

The Supreme Court of Minnesota in all things agreed with the trial court and held that the case came within the provisions of the Safety Appliance Act. The court distinguished the McCalmont case relied upon by the railroad company in its petition for writ of certiorari herein.

We quote further from the opinion of the Supreme Court of Minnesota:

"1. Do the facts bring this case within the provisions of the Safety Appliance Act? The defendant asserts that nothing happened while this car was chained up and hauled on to the side track, and that it there came to rest, and that it at that instant ceased to be 'used' by the carrier. *It attempts to put this defective car in the status of the car in McCalmont v. Penn. R. Co.*, 273 Fed. 231, affirmed 283 Fed. 736, wherein a car was placed on a *dead* track where an employee was later injured. In this

case the defective car was *not yet placed* to be left and in fact the equipment, the chain, used to replace the defective coupling, was still intact *and the car remained in the train of which it was a part.* There was here no break in the chain of events between the pulling out of the draw-bar and the injury. Defendant argues that on the theory of the plaintiff, if the defendant would haul the car, it would violate the act, and if it did not haul it, it violated the act. Such is not the case. If defendant hauled the car in use, knowing it was defective, it would be subject to a penalty. It had the right, however, to haul the car to a repair track without incurring a penalty, but such movement should, notwithstanding, be *at the sole risk of the carrier.* Clearly the facts bring this case within the Safety Appliance Act. *Otos v. Great N. R. Co.*, 128 Minn 283, 150 N. W. 922 (affirmed 239 U. S. 349); *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; *Goucau v. M. St. P. & S. S. M. R. Co.*, —— Minn. ——, 191 N. W. 279; *Frye v. C. R. I. & P. R. Co.*, —— Minn. ——, 195 N. W. 629" (599-602).

On the question of proximate cause, which was submitted to the jury under full and complete instructions, the Supreme Court of Minnesota said:

> "2. That the defective draw-bar did proximately contribute to the injury is clearly established. As above indicated, the unbroken chain of events, from the moment the car became defective until the accident happened; the circumstances, the character of the injury, and the happening thereof, all lead to the irrepressible conclusion that the defective draw-bar was a proximate cause of the injury.
>
> The jury necessarily found, under the in-

structions of the court, that the defect was the proximate cause of the injury. This conclusion is inevitable as that was a condition of plaintiff's right to recover" (602-603).

The Supreme Court also used this language:

"After this draw pulled out there was not any new intervening cause of itself sufficient to stand as the cause of the injury" (612).

ARGUMENT.

Writ Was Improvidently Granted.

The Federal Statute.

That under the Federal statute the defendant was bound absolutely and unconditionally to maintain its appliances in proper condition, will not be disputed.

In addition to the general, absolute and unqualified duty provided in the Safety Appliance Act, it is provided in Section 4 of the Act of 1910 as follows:

"Such movement or hauling of such car shall be *at the sole risk of the carrier,* and nothing in this section shall be construed to *relieve* such carrier from *liability in any remedial action* for the death or injury of any railroad employee caused to such employee *by reason of or in connection with the movement* or *hauling* of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and *nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains* instead of *draw-bars,*

> in revenue trains or *in association with other cars* that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

Petitioner did not apprise the court of the true facts in the petition for writ of certiorari.

On page 6 of the petition for certiorari petitioner says:

> "In starting the train a draw-bar was pulled out and an immediate stop was made."

This statement is misleading. The court might well receive the impression from this statement that the defective car was stopped and there was to be no further movement thereof. It was, however, the intention to switch this car out of the train (35).

The conductor, O'Leary, testified:

> "Well, we done that. We backed up and put the chain on this car and pulled the rear end of the train into the side track" (34).

This was the first movement made with the defective car.

On page 7 of the petition this statement appears:

> "After the train had come to a stop on the passing track, Brakeman Quist was told *by Ring* to cut off the engine, and bring it to the rear of the train."

This statement and others in the petition might lead the court to believe that Ring, the decedent, was the party *giving the directions* as to the movement of the train. This was not the fact.

O'Leary testified:

"Q. And when you discovered that (that the draw-bar was pulled out) what did you do?

A. *I sent this brakeman,* Ring,—the train stood on a reverse curve at the time,—and *I sent this brakeman,* Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side track" (33-34).

Ring in giving directions to Quist was *simply following the orders which his superior,* the conductor, O'Leary, had given to him.

On page 8 of the petition it is said:

"Ring gave no warning to the engineer that he was going between the cars."

The undisputed evidence is that decedent Ring was *working under the conductor,* O'Leary.

"Q. *And you* (O'Leary) *were in charge of the train as conductor?*

A. *Yes, sir*" (39).

O'Leary further testified:

"I asked him if he could unhook the chain and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (36).

The statement in the petition for writ of certiorari that Ring gave no warning to the engineer that he was going between the cars was clearly misleading. Ring was only a subordinate, O'Leary was his superior in authority.

Under the heading, "The Questions Involved," petitioner in the application for writ of certiorari

stated several reasons why this court should grant the writ.

The reasons are based on incorrect statements of fact and we desire to call the court's attention thereto.

We quote from the petition:

> "First: The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the side track and had ceased to be 'used,' as contemplated by the Act" (P. 9 of petition).

This statement is not borne out by the record and is incorrect.

The car had *not come to rest* on the side track. As Conductor O'Leary, testified:

> "We stopped *to head in at Budd* to meet an east bound train and in starting we pulled the draw-bar out" (33).

This was not a case of working on a car which had been placed on a dead track.

There was further work to be done with this car, and it had not yet been taken out of the train.

Conductor O'Leary testified:

> "Yes, I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

Chief Justice Wilson, in the opinion of the Supreme Court of Minnesota, said as to this:

> "In this case *the defective car was not yet placed to be left, and in fact the equipment, the chain, used to replace the defective coupling,*

was still intact and the car remained in the train of which it was a part" (599).

Had the car come to rest on a side track and had it not been in use, if it were not being hauled or moved, as was the case in *McCalmont v. Penn. R. Co.*, 283 Fed. 736, relied on by petitioner, this court could well have granted the petition for the writ of certiorari to review the question of the liability of the railway company.

The facts are not as stated in the petition, however. The car, under the undisputed evidence, had *not* come to rest and had *not* ceased to be used.

We speak advisedly when we say, "under the undisputed evidence." There was no evidence to contradict the evidence of the conductor, O'Leary.

In the petition it is also said:

> "Second: The defective draw-bar did not proximately contribute to the injury" (P. 9 of petition).

Following this, it is stated that there were three active forces intervening:

1. That Ring sent the brakeman, Quist, with directions to cut off the engine, and, as stated in the petition on page 9 thereof, "It was in carrying out *Ring's directions* that any motion of the train took place. *Ring controlled the movement of the train."*

Ring was *not* in charge of the train. *Conductor O'Leary was in charge of the train.* As appears from his testimony heretofore quoted:

> *"I sent this brakeman,* Ring, over to tell the head man to get where he could make signals" (34).

Further, as appears from O'Leary's testimony:

"Q. And *you were in charge* of the train as conductor?

A. *Yes, sir*" (39).

To sustain its *claim that Ring controlled the movement* of the train, the railway company cites folios 298-300. This refers to the record in the Supreme Court of Minnesota.

The same evidence is found in the record in this court at folios 297-300.

What is this testimony petitioner claims sustains the contention that Ring controlled the movement of the car?

For the convenience of the court, we quote from the testimony of Quist:

"Q. And then what did you do?

A. I stayed right there and waited a few minutes, not so very long, and got a signal to go ahead.

Q. And then what was done?

A. And then I says, what happened back there, did we get a draw-bar? Yes.

Q. Who did you say that to?

A. To Ring.

Q. Did Ring answer?

A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear. He says, that remains to be seen, go ahead and pull him in, and come around with the engine.

Q. What does that mean?

A. Well, *I took it to mean* that I should go in and go around with the engine.

Q. That expression?

A. That means that, to go around about my

business, to go up there and get into clear, and come back.

Q. Cut off the engine?

A. Yes, cut off the engine, and come back.

Q. Was that done?

A. Yes, sir.

Q. And the train was pulled in onto the passing track?

A. Yes, sir" (297-299).

This testimony does not sustain the statement in the petition that it was in carrying out Ring's directions that the train moved and that *Ring controlled the movement thereof.* Anything Ring said or did was said or done under the orders of his superior, Conductor O'Leary.

2. Petitioner further says that an active force intervening so as not to make the draw-bar the proximate cause of the injury was the act of decedent in knowingly placing himself between the cars without notifying the engine crew, and that this, together with the instructions to Quist to cut off the engine, was more than contributory negligence.

A complete answer to this is the testimony of the conductor that Ring was working and acting under his directions and that he, the conductor, was in charge of the train.

3. It is claimed that when the train started in motion decedent did not *get out promptly,* and that his act, therefore, was the sole cause of his death.

It is stated on page 10 of the petition:

> "The emergency was created by Ring's instructions to Quist, and Ring's going between the cars without notice to Quist or the engine men."

Again, we call the attention of the court to the fact that O'Leary was the conductor in charge of the train; that Ring gave no instructions; that he simply repeated what the conductor told him to; that Ring went between the cars to unhook the chain *at the direction of the conductor.*

> "I asked him if he could unhook the chain, and he said he didn't know, and he set down his lantern and he tried and he couldn't do it" (36).

Furthermore, the most that could be said for the defendant is that the decedent may have been guilty of some *contributory negligence* in failing to get out from between the cars, as promptly as he should have.

The Minnesota Supreme Court held that there were no active forces intervening to break the chain of proximate cause.

We quote further from the opinion of the Minnesota court:

> *"There was here no break in the chain of events* between the pulling out of the draw-bar and the injury" (600).

On page 10 of the petition, it is stated that

> "the probability that the injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely that it could not reasonably be foreseen."

This, of course, does not involve any statement of fact which would justify the issuance of the writ.

The violation of the statute was negligence *per se.*

San Antonio v. Wagner, 241 U. S. 476, 60 L. Ed. 1110.

The railroad company was liable for any injury proximately flowing from that violation.

Davis, Agent v. Wolfe, 44 S. C. 64.

On page 10 of the petition, it is said that the question of the *violation of rules* should have been submitted to the jury. As to this question, the Minnesota Supreme Court said:

> "If decedent violated the rules and in that respect was guilty of *negligence*, himself, which *contributed* to the injury, that fact would not bar a recovery. Sec. 3, Act of April 22, 1908, 35 Stat. at L. p. 65, ch. 149; *Fletcher v. S. D. Cen. R. Co.*, 155 N. W. 3; *Grand Trunk v. Lindsay*, 233 U. S. 42."

On page 13 of the brief in support of the petition for writ of certiorari, petitioner states that the McCalmont case is in point, and on pages 13 and 14 this language with reference to the facts in the case at bar is used:

> "The car was safely shoved in *to rest* on the siding and at that moment, having so been placed on this side track, it ceased to be 'used' by the carrier."

Were this the fact, it might afford ground for the granting of the writ. This statement is *not borne out by the record* and undoubtedly was misleading to the court.

The car in the case at bar had *not yet been taken out of the train.* It had not ceased to be "used," and had not come to rest. It was in the process of being moved *for the purpose of switching it out of the train* when decedent was killed.

As Conductor O'Leary testified:

> "'We backed up and put the chain on this car and pulled the rear end of the train into the side track. * * * I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train.* * * * After we got on the side track I was in the rear end of the train and Ring was up by this car that had the draw-bar out * * * and I asked him if he could unhook the chain * * * and he tried and couldn't do it. * * * He reached down to lift up the chain to give the slack to me so I could pull the chain, and the train backed up" (34-37).

It is significant that in the petition for certiorari petitioner does not state any folio or place in the record where evidence may be found to sustain the *claim* that the car was "safely shoved in to rest on the siding."

Had the car been at rest on the siding, and had the car not been in use, the doctrine of the Conarty and Lang cases might have been applicable, also the McCalmont case relied on by petitioner, but the facts were entirely different.

On page 14 of the petition the McCalmont case is quoted from as follows:

> "The defendant was not hauling it or permitting it to be hauled or used on its line. It had taken it out of use and placed it *on a dead track.*"

Following this, on page 15, petitioner says:

> "Now, in *that* case, and *in the one under discussion,* the *salient points* are the *same.*"

The salient points are not the same, and in the case at bar the car was still being *hauled, moved* and *used;* it was not taken out of use; and it was not placed on a *dead track,* or any other track. It was still in the train when Ring was killed.

Further, on page 15, petitioner says:

> "If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate the law."

We again call the attention of the court to the testimony of Conductor O'Leary relative to what was further to be done with the car:

> "We would *switch it out of the train*" (35).

After so stating the facts as to give the court the impression that the car was a stationary one, *dead,* and *at rest* on a side track, petitioner cites many cases holding that employees working about such *dead* and stationary cars who were injured because of defects in draw-bars or couplers are not entitled to the benefit of the Safety Appliance Act.

Such cases have no bearing whatever upon the case at bar, because the car in question had not come to rest; it was not taken out of the train; it was still in use, and was still a part of the same train which had just come into the Station of Budd.

> See opinion of Minnesota Supreme Court, folio 600.

We cannot escape the conclusion that the writ was improvidently granted.

CAUSE WILL BE DISMISSED WHERE WRIT IMPROVIDENTLY GRANTED.

In *Furness, Withy, etc. Co. v. Yang-tsze,* 242 U. S. 430, 61 L. Ed. 409, in the opinion by Mr. Justice McReynolds, it was said:

> "The writ of certiorari was *improvidently granted* and must be dismissed. We should have denied the petition therefor if the facts essential to an adequate appreciation of the situation had then been brought to our attention. Petitions of this character are at the risk of the party making them, and whenever, in the progress of the cause, facts develop which, if disclosed on the application, would have induced a refusal, the court may, upon motion by a party, or *ex mero motu,* dismiss the writ."

As to the cases when writs of certiorari would be granted, it was said in the early case of *Forsyth v. Hammond,* 166 U. S. 504, 41 L. Ed. 1095:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding *conflict* between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Manifestly from the record in this case, the question involved is not one of great public moment or importance. Furthermore, the question has been settled and determined by many decisions of this court. The *lower courts were unanimous* in holding the defendant liable for the death of Ring.

In the later case of *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 395, it was said that where a writ of certiorari was improvidently granted it would be dismissed.

In the recent case of *Southern Power Co. v. North Carolina Public Serv. Co.*, decided January 7th, 1924, 44 S. C. 164, Mr. Justice McReynolds again called attention to the fact that in petitions for certiorari there was a "necessity for clear definite and complete disclosures concerning the controversy."

Where there was not such a complete disclosure, it was said that the writ would be dismissed.

In that case, the petition stated "that the cause involved a grave question of vital importance to the public," as does the petition in the case at bar.

In neither case was such statement sustained by the record.

In the Southern Power Co. case there was no question of "vital importance to the public," but the question was, as stated by Mr. Justice McReynolds "primarily a question of fact" • • • which "if sufficiently developed would not have moved us" to grant the writ.

IF THE WRIT BE NOT DISMISSED, THE JUDGMENT SHOULD NEVERTHELESS BE AFFIRMED.

This is a simple case for damages for personal injuries resulting in the death of a railway freight brakeman. The brakeman was killed while between cars which were chained together because of a defective draw-bar.

It was the intention to take the defective car to the side track and *then* to switch it out of the train. The movement, according to the undisputed testimony, had *not been completed.*

Decedent at the request and direction of a superior officer, the conductor, went between the ends of the defective car and the adjoining car to unhook the chain. In the movement of the cars, he was killed.

It has been settled by the decisions of this court in *Great N. R. Co. v. Otos,* 239 U. S. 349, 60 L. Ed. 322, that the defendant is liable for injuries or death resulting when a defective car is being taken to a side track for repairs.

In that case, Mr. Justice Holmes said:

> "It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress. *Delk v. St. L. & S. F. R. Co.,* 220 U. S. 580, 55 L. Ed. 590, 31 S. C. 617. As the Safety Appliance Act governed this case, it imposed an absolute liability upon the carrier."

After referring to the Supplementary Act of April 14, 1910, providing that carriers might move cars to a repair track without being subject to the penalty, but that such movement should be *at the sole risk of the carrier,* Mr. Justice Holmes further said:

> "Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, *the Act of 1910 imports, with unmistakable iteration, that the liability exists.*"

On the question of proximate cause the Otos case is also determinative of the case at bar.

The trial court properly defined proximate cause in its instructions to the jury, and the jury were told that unless the defect did constitute the proximate cause of the injury, there could be no recovery.

We quote from the instruction of the trial court to the jury:

> "Unless the defective condition of the coupling was the proximate cause of the injury to decedent, the plaintiff cannot recover" (520).

Apropos is the language of Mr. Justice Holmes in the Otos case wherein he said:

> "Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover."

CASE INVOLVES ONLY AN APPECIATION OF THE FACTS.

This case involves but an appreciation of the facts and the question whether from such facts a liability exists. The lower courts both concurred in holding that such liability did exist.

There is no question of construction of the statute involved, and this case falls within the cases of which *Great N. R. Co. v. Knapp,* 240 U. S. 464, 60 L. Ed. 745, are typical.

In that case Mr. Justice Hughes said:

> "The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act, or as to the definition of legal principle in its application, but

simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion."

The Knapp case was a personal injury case involving an injury to an employee working about a pumping station. The questions of assumption of risk, proximate cause, etc. were raised in that case, as in the case at bar.

We very respectfully submit to the court that the writ of certiorari should be dismissed.

If the writ be not dismissed the judgment of the Minnesota court should be affirmed.

IF MOTIONS TO DISMISS OR AFFIRM BE DENIED THE CAUSE SHOULD BE ADVANCED.

The practice of railway companies in filing petitions for writs of certiorari in simple personal injury cases is a continuing and a growing one.

We are constrained to the opinion that oftentimes these petitions are filed with the sole idea of "going to the highest court," before making payment to the injured man or the surviving widow.

Manifestly, there is considerable delay before the judgment of the lower court must be paid when

these petitions are filed.

Before the Act of 1913, providing that actions under the Employers' Liability Act could be reviewed only upon a petition for certiorari, it was the common practice for railway companies to sue out writs of error in nearly every case involving a substantial amount.

Congress, to stop this practice, passed the 1913 amendment, providing that such actions might be reviewed only by petition for writ of certiorari.

The case at bar involves no great legal principle.

It involves no question of construction of a Federal statute, no constitutional question; nor does it involve any great legal principle.

The decision of the case will be of importance only to the railroad company and the surviving widow and child of decedent.

The cause is one which can be adequately presented to the court within the time allotted for presenting causes on the summary docket and the avoidance of the law's delays demands that there be a speedy hearing and determination of this cause.

The questions involved are of such a nature that respondent prays that the court place the cause on the summary docket for hearing as provided by the rules of this court.

Dated at Minneapolis, Minnesota, August 4th, 1924.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Attorneys for Respondent,

Minneapolis, Minnesota.

FILED
DEC 31 1924
WM. R. STANSBURY

No. 422

Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Petitioner,

vs.

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EDMUND LUDWIG RING, DECEASED,
Respondent.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

This case is here upon a writ of certiorari granted by this court to review a judgment of the Supreme Court of Minnesota, which judgment affirmed a judgment of the District Court of Yellow Medicine county, Minnesota, in favor of respondent for damages for the death of Edmund Ludwig Ring, a switchman employed by the petitioner.

The right of recovery was based on the Employers' Liability Law and a violation of the coupler provision of the Safety Appliance Act.

The trial court submitted to the jury the question of whether the defendant violated the Safety Appliance Act and whether such violation contributed in whole or in part as a proximate cause to

the death of decedent.

Upon appeal the Supreme Court of the state of Minnesota affirmed the judgment of the lower court.

Thereafter a petition for a writ of certiorari was filed in this court asking a review of the judgment so entered.

The writ of certiorari was granted by this court. After the granting of the writ of certiorari respondent moved the court to dismiss the writ on the ground that it was *improvidently granted* and for the reason that the court was not advised as to the *true facts* surrounding the injury to and death of the decedent, Ring.

In the alternative, respondent asked that the cause be advanced for hearing to the summary docket.

The motion was submitted on October 6th, 1924, and this court ordered that the cause be placed on the summary docket for hearing, and further ordered that the motion to dismiss be heard and determined upon the argument of the cause upon the merits.

The Writ Should be Dismissed.

The motion to dismiss the writ of certiorari herein should be granted on all of the grounds set forth and contained in the motion to dismiss, and the brief in support thereof which has heretofore been filed in this court.

STATEMENT OF FACTS.

While not wishing to burden the court with repeatedly stating the facts in the case, counsel for respondent feel that in the *interest of accuracy and clarity,* a complete statement of the facts in this case should again be made to this court.

In the petition for the writ of certiorari herein petitioner made many statements, not only inaccurate but wholly unsupported by any facts in the record. Many of these inaccuracies are pointed out in the motion to dismiss.

In the brief of petitioners on the merits there are also a number of statements which, if not wholly inaccurate, are at least of a character very likely to mislead and deceive the court.

Undisputed Facts.

(Figures in parentheses refer to folios of printed transcript of record.)

There is no question but that decedent Ring was employed by the railroad company as a brakeman and that he was injured at Budd, Iowa, on October 4th, 1922.

He survived his injury for a period of approximately fifteen days.

Interstate Commerce Conceded.

There was no dispute but that the train in question was interstate in character, and there was no

claim but that the rights of the parties were governed by the Employers' Liability Law of Congress.

Defective Draw-Bar Conceded.

There was no dispute but that there was a defective draw-bar on one of the cars forming a part of a freight train being operated by the defendant through the station of Budd, Iowa, on October 4th, 1922.

The draw-bar of this car pulled out and it was necessary to chain it to an adjoining car in order to move it. This fact was not disputed.

Conductor in Charge of Train.

The conductor, who had charge of the train in question, was one J. P. O'Leary (27).

There was no question but that the conductor had charge of the train and of the brakeman, Ring, and his fellow brakeman, one Quist (39).

The Accident—The Use of the Defective Car.

On October 4th, 1922, the freight train, in charge of Conductor O'Leary, with Brakemen Ring and Quist, pulled into the station of Budd, Iowa.

The train consisted of about forty cars, most of them being loads (32).

The train stopped at Budd and headed into a side-track to meet an eastbound train.

In starting up again, a draw-bar pulled out (33).

As to what occurred after this draw-bar pulled out, Conductor O'Leary testified:

> "Q. And when you discovered that, what did you do?
>
> A. I sent this brakeman, Ring,—the train stood on the reverse curve at the time,—and I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side-track.
>
> Q. And after that was done?
>
> A. Well, we done that. We backed up and cut the chain on this car and pulled the rear end of the train into the side-track.
>
> Q. And did Ring act under your directions in helping to chain up the draw-bar of this car?
>
> A. Yes, sir.
>
> Q. And then you pulled it up on to the side-track?
>
> A. Yes" (33-35).

The court will note that the train was pulled onto the side-track.

The impression is conveyed by the brief of the petitioner that the defective car had come to a standstill on a dead track and that it was out of use. This is far from the fact, and we again refer to the record.

The conductor, O'Leary, was asked as to what other work remained to be done with the car after the train was gotten to the side-track. It is to be remembered that this car was not singly taken out of the train at this time, and taken to the side-track, but the *entire train moved to the side-track.*

> "Q. After you did that, did you have *any other work* with regard to this draw-bar?

A. Yes. I told Ring and told the rear brakeman *after* we pulled the train in, *we would switch it out of the train*" (35).

From this testimony it is apparent that *after* the defective car, which was part of the train of forty cars, was on the side-track, it was then to be switched out of the train, the balance of the cars taken and the defective car was to be left on the side-track. Before this could be done it was necessary that the defective car be switched and moved out of the train.

CONDUCTOR O'LEARY IN CHARGE OF THE WORK.

While there is no direct claim made by petitioner that Conductor O'Leary did not have charge of the work in question the impression apparently is sought to be conveyed that the brakeman, Ring, had charge of the work and the direction of the train movement.

The record however clearly shows the conductor to have been in charge of the train and to have directed Ring in the doing of his work.

"Q. And *you were in charge of the train as conductor?*

A. *Yes, sir*" (39).

O'Leary further testified:

"Q. Well, you were conductor of the train?

A. Yes.

Q. *And he was working under you?*

A. *Yes, sir.*

Q. And if he went in there to unhook the chain before you moved the train it would be

your duty to tell him to get out?

A. Yes, sir.

Q. *And he was in there working with you and doing whatever you suggested he should do, wasn't he?*

A. *Yes.*

Q. *And you were his superior as conductor? He was your brakeman?*

A. *Yes, sir*" (40-41).

After the car reached the side-track the conductor further directed Ring and asked him to go between the defective car and the adjoining car and unhook the chain by which the cars were fastened together.

"Q. And did Ring have anything to do with this draw-bar after you got it into the side-track?

A. After we got on the side-track I was in the rear end of the train and Ring was up by this car that had the draw-bar out and I got out and walked up to a car length from where he was and *I asked him if he could unhook the chain and he said he didn't know*, and he set down his lantern and he tried and he couldn't do it" (35-36).

The statement above quoted is of importance because of the *claim* of the railroad company that the car had come to rest and decedent had *nothing further to do with it*, and it was not in use when on the side-track in question.

In this connection the *purpose of the movement* is of importance.

Conductor O'Leary further testified as to this purpose as follows:

"Q. What was the purpose of unhooking the chain at that time?

A. Because I couldn't take the car in the train further in that condition. *I had to get it out of the train in some way, and that chain had to be unhooked to get it out of the train*" (64-65).

In order to get this defective car *out of the train* in question, it was necessary to uncouple the engine from the front end of the car, run it down past the switch, then down on another track, and through another switch so as to bring it up to the rear of the train.

"I figured on *bringing her to the rear end and head into the caboose*" (65).

It was the intention to move the caboose from the train, *then get the defective car,* and, as Conductor O'Leary testified, "*set it in behind the caboose* and leave it there" (69).

On cross examination by counsel for the railroad company it very clearly appeared that the car in question had not been set at its final resting place but that the movement anticipated was to get the car out of the train and place it at the rear of the caboose.

"Q. Now, I believe you have testified to it, but to make sure I will ask you this question: When you were going in to the chain to unhook it, to which you testified on Mr. Davis' direct examination that was the first thing to be done *in order to get this bad-order car out of the train?*

A. Unhook the chain, yes.

Q. And did you have any other object or

purpose in mind at the time you were doing that?

A. No" (69).

So far as the use of the car is concerned and the claim of the petitioner that it was not in use, Conductor O'Leary further testified:

"Q. And it was *while you were moving this car with the defective draw-bar* that Mr. Ring was injured on the side-track?

A. Yes" (58).

This statement by the conductor may be somewhat misleading, but it is clear that the defective car was *not* at rest, but that while it was to be moved and was to be put to the rear of the train, the injury to decedent occurred.

Having in mind now the movement contemplated and what actually took place, that is, the switching of the entire train to the side-track, the intent to take the engine from the front of the train, bring it to the rear, remove the caboose and then put the defective car at the rear of the train, we come to a consideration of the facts immediately previous to the injury to Ring.

The train had gotten to the side-track. It was standing perfectly still.

The conductor was in charge of the train, and Ring was assisting him. As the conductor testified:

"I asked him if he could unhook the chain, and he said he didn't know" (35-36).

"Q. And then what happened?

A. And I told him to let me try, and I

couldn't unhook it. It was a heavy chain and one man couldn't handle it, and he climbed over the end of the car and got on the other side, so I was on one side of the draw-bar and he was on the other, and he was facing the east and *he reached down to lift up the chain, and the train backed up*" (36-37).

While decedent was between the cars the train backed up without any signal or warning (37). This is an undisputed and uncontroverted fact.

"Q. And no warning was given that the train was coming back?

A. No.

Q. *And you were in charge of the train as conductor?*

A. *Yes, sir.*

Q. And you gave no signal to back up?

A. No.

Q. Had you given any directions to them not to back up until you had unhooked the chain?

A. No" (39).

As O'Leary testified:

"I figured on bringing her to the rear end and head it into the caboose."

By this he meant that the engine was to come to the rear of the train and move the caboose and *then* get the bad-order car (66).

After explaining how this movement would be made this question was asked:

"Q. And *then* what would you have to do *in order to complete this movement,* if anything?" (67.)

This question is significant. *To complete the*

movement. It is clear from this question and the answer which follows that the car *could not have been at rest* and at its destination on a dead track as petitioner's brief would lead the court to believe.

In answer to the question just quoted, O'Leary testified:

> "A. Well here is the caboose here (indicating). We would go up and hook on to it. *In order to get the bad-order car out* you would have to *unhook the chain* that coupled it to the head of the train and *pull it back* and *throw it out on the main line—this bad-order car, I mean*" (68).

At folios 68 and 69, the conductor speaks of the *movement* to be made, the language being in the past tense.

For instance, the question is asked:

> "Q. Then what did you do with the bad-order car?
>
> A. Set it behind the caboose and leave it there" (69).

What the witness meant by the testimony, and it will be apparent to the court from reading the record, was that the *intended movement* was to *take the caboose off the rear of the train* and *then pull the bad-order car out* and *then hook the caboose onto the train* and *set the bad-order car in behind the caboose.*

THE CLAIMED DIRECTION OF THE DECEDENT, RING, TO HIS FELLOW BRAKEMAN, QUIST.

It is very vital to get clearly in mind the facts as to what took place *after* the draw-bar was found to be defective.

The petitioner says, in effect, that the *decedent gave directions to move the train,* and *then* went between the defective car and the adjoining car.

There is nothing in the record to sustain any such claim and any statements to this effect are not only wholly inaccurate but positively incorrect and must be misleading to the court.

The railroad called as a witness the brakeman, Frank Quist (292).

Quist testified that after he learned that the draw-bar had pulled out he talked to decedent Ring:

> "A. And then I says, what happened back there, did we get a draw-bar? Yes.
>
> Q. Who did you say that to?
>
> A. To Ring.
>
> Q. Did Ring answer?
>
> A. Yes, he said yes. I said, what shape or condition is it in, will she pull, I says, into clear? He says, that remains to be seen, *go ahead and pull him in, and come around with the engine.*
>
> Q. What does that mean?
>
> A. Well, *I took it to mean* that I should go in and *go around with the engine.*
>
> Q. That expression?
>
> A. That means that, to go around about my business, to go up there and get into clear, *and come back.*
>
> Q. *Cut off the engine?*" (297-299.)

Bearing in mind now the movement of the car from the main track to the side-track, it is clear that the *only direction* that Ring could have given was the direction *to take the entire train to the side-track. This was done. During this movement Ring was not injured.*

The train came to a stop on the side-track.

After the train came to a stop on the side-track the brakeman, Quist, does not claim, nor does anyone else, that Ring told him to *move a car.*

The statement above made is of importance and it is a correct statement of the record.

The *impression* might be gained from reading petitioner's brief that Ring gave a direction *to move the engine and the train while he, Ring, was between the cars.* Or it may be concluded from reading petitioner's brief that Ring gave the direction which he must have known would have resulted in the movement of the train and without notifying the engine crew Ring went between the defective car and the adjoining car.

The language just above quoted shows that Quist was to direct the train movement *until the train came to rest on the side-track.*

After the train came to rest on the side-track, there was to be *no further movement of the train until* the engine was *disconnected,* taken down another *side-track* and *brought to the rear of the train.*

Had Ring been between the defective car and the adjoining car, and had the engine come from the head of the train back over the switch and coupled onto the caboose and moved the cars while Ring

was then between them, there might *possibly* be something to petitioner's contention.

It is to be borne in mind, however, that Ring was injured *before* the engine got back to the rear of the caboose.

Ring was not injured by any *movement of the cars* which *he had directed* or *authorized.* The train had come to a stop on the side-track (300).

After it had come to a stop the conductor directed Ring to unhook the chain.

After this, after Quist had received a signal to put the train on the side-track and after the train was on the side-track and was standing still, Ring went in between the defective car and the adjoining car *in response to the order of his superior officer, the conductor* (32, 36, 37).

After the train had come to a *stop* the brakeman, Quist, was to disconnect the engine. He was unable to disconnect the engine by the use of the lifting lever "because the knuckles was tight" (301).

As Quist testified:

> "Q. What did you do when you got there?
> A. I stepped in between and turned the angle-cock preparing to cut the engine off.
> Q. The angle-cock, you mean the air?
> A. That is the air, yes, sir. I thought probably I could get the pin without any slacking up, but I couldn't" (300-301).

When he found that he could not get the engine uncoupled from the train, Quist gave a signal to the engineer to back the train up (302).

He testified that he got the slack and raised the

pin (303); and that he gave the engineer a signal to *go ahead, "and the car started the other way"* (303).

Evidently by this, the witness meant that the rest of the train started in a backward direction after he had given the engineer the signal to go ahead.

Quist was asked the question:

> "Q. The train that you cut off started the other way?"

In answer to this, he said:

> "A. * * * Set the air and stopped the train from going out the other end" (303).

As to this *movement* there is nothing in the record to the effect that decedent, Ring, gave directions for the *movement* which would send the cars backward after they had been *brought to a stop* on the side-track; nor is there any evidence that decedent, Ring, could anticipate that any such movement would occur.

Quist says that he was following the instructions of Ring in cutting the engine off to bring it around to the rear of the train (305).

We have here a train *standing still on a side-track.* Decedent was between the end of the defective car and an adjoining car.

The *only direction* that had been given was *to disconnect an engine from a train, which was standing perfectly still.* There is nothing in the record to justify the inference in petitioner's brief that Ring gave directions to move the train and then

went between the ends of the cars.

Quist did not set the air on the cars until they started to drift (330).

He knew generally about the grade but claims he did not know with exactness as to the degree thereof (328-329).

He did not know any one was between the cars when he cut the engine off (357), and when he did cut the engine off, he did not know whether the air had been set on the cars or not (359).

Neither Conductor O'Leary nor the brakeman, Quist, advised the engineer that they were between the cars at the time in question.

There was, of course, *no reason for them to give such advice* because the cars had come to a standstill on the side-track and the only direction was to *disconnect the engine from a train of cars standing perfectly still.*

Just what caused the train to back up seemed to be a matter of some doubt, whether it was the running out of the slack or the direction given by Quist to back up the engine so he could get the pin.

Ring had been in between the cars for some time before the movement occurred (86).

The engineer, Flower, testified that Quist gave him a signal to slack the train (254). This was so the uncoupling could be made.

> "Q. How far would it be necessary for your engine to move to give the slack to the pin?
>
> A. Oh, I would say *a couple of inches.*
>
> Q. Just *enough to loosen the pin* that was bound because it was coupled up?
>
> A. Yes" (281).

This testimony is of special importance in view of the claim of the petitioner that Ring gave directions as to the *movement of the train.* Ring merely told Quist to have the engine cut off and brought to the rear of the train. So far as any backward movement of the engine is concerned, the engine could have been uncoupled as shown by the testimony of the engineer, Flower, by a movement of *a couple of inches* (281).

Along this same line the brakeman, Quist, testified that he thought he could get the pin, that is, make the uncoupling *without any movement* of the engine.

> "I thought probably I could get the pin without any slacking up" (301).

If Quist thought he could make the uncoupling without a train movement, it must certainly be reasonable to assume that *Ring thought the very same thing*, as did the conductor, O'Leary.

None of the crew had given any instructions regarding the movement of the train which was to be made after O'Leary and Ring were between the defective car and the adjoining car. The direction of Ring to Quist did not contemplate any movement of the cars while he was between them. It was merely an order that an engine be disconnected from a train which was standing still. The engine was *later*, in the contemplated movement, to be connected to the caboose and the defective car pulled out of the train.

SUMMARY OF FACTS.

A freight train pulled into Budd, Iowa, and a draw-bar was found to be defective. It had pulled out of the car.

The car was chained to the adjoining car. The train was pulled to the side-track. Directions were given to *uncouple the engine* from the head of the train, *bring it around on another track* to the rear of the train, *pull off the caboose*, then *pull out the defective car,* and leave it behind the caboose.

While the train was standing still on the side-track, and before the engine was uncoupled and *before the defective car had been taken out of the train and placed to the rear*, as was intended, and before the movement of the defective car had been completed, the brakeman, Ring, at the direction of his superior, went between the ends of the defective car and the adjoining car and attempted to unloosen the chain which held the cars together.

While he was between the ends of the cars a movement thereof occurred, of which he had no warning, and which he had no reason to anticipate. This movement injured him, the injuries subsequently resulting in his death.

Decedent was acting at all times, under the orders of his conductor.

When these facts were presented to the trial court, the trial court submitted the case to the jury, leaving the question of fact for them to determine as to whether or not the coupling appliance was in fact defective.

The trial court also submitted the question of proximate cause to the jury in the following language:

> "Proximate cause of an injury is that which causes it directly or immediately, or through a natural sequence of events, without the intervention of any other independent or efficient cause. The defective coupler may be found to be the proximate cause of decedent's injury if it was a direct and immediate cause without which the injury would not have occurred" (522).

On the question of the rules, the court instructed the jury that the acts of the plaintiff were no defense unless the acts were the *sole cause* of the injury (537).

The jury, the trial court and the Supreme Court of Minnesota found for plaintiff *on all the issues of the case.*

Inaccurate Statements in Petitioner's Brief.

Before we come to the questions of law in this case, we desire to call attention to some of the statements in petitioner's brief which are likely to mislead the court.

On page 3 of the brief of petitioner, it is said:

> "No warning to Ring was called for because the *movement* was made in compliance with Ring's direction to Quist."

From the facts, as heretofore stated, it is apparent that Ring did not give *any direction whatever calling for a movement* of the cars in question.

The direction was to uncouple the engine from a train which was standing still.

As the engineer, Flower, testified (281), so far as uncoupling the engine was concerned, a movement of a couple of inches would be sufficient.

It also appears on page 3 of petitioner's brief:

> "He made no effort to step out from between the cars, although, as the conductor testified, his idea would be to get out of there."

This relates to the *movement* which occurred when Ring was between the ends of the cars. When the *emergency* confronted him, he attempted to save himself by drawing his arm over the axle. He was *not standing up*, as was Conductor O'Leary, and he was not in position to immediately step out from between the cars, as did the conductor.

At the top of page 3 of petitioner's brief, it is said that Ring and O'Leary, without the knowledge of Quist or the engineman, went to the bad-order car to unhook the chain.

It might be inferred from this statement that there was to have been a *movement* of the train while Ring and O'Leary were between the cars, which Ring and O'Leary knew about, or which O'Leary had directed or authorized.

The fact is that the train at the time was *standing still* and there was *no movement contemplated until* the engine was *brought around to the rear of the train*.

A statement is made on page 4 of petitioner's brief that Ring was familiar with the grade at Budd where the accident occurred, but there is no

showing that the grade was of such a character that cars would start in motion when the engine was disconnected from this train, forty cars in length.

It is said on page 4 of petitioner's brief:

> "Ring gave no warning to the engineer that he was going between the cars."

This statement is correct. But there should not be an *inference* from this fact that Ring figured there would be *any movement* of the cars. It is also said on page 4 of petitioner's brief that Ring "went in there of his own accord."

While it is true that this language was used by the conductor, O'Leary, when he was on the stand, this statement, standing alone, conveys a wrong impression, because O'Leary several times stated that Ring was in between the ends of the cars at O'Leary's direction (36-37).

> "Q. *He was working under you?*
> A. *Yes.*
> Q. *And if he went in there to unhook the chain before you moved the train it would be your duty to tell him to get out?*
> A. *Yes, sir.*
> Q. *And he was in there working with you and doing whatever you suggested he should do, wasn't he?*
> A. *Yes*" (41).

Under the heading, "Questions Involved," on page 5 of petitioner's brief, this appears:

> "In carrying out *Ring's directions the movement of the train took place. Ring thus controlled the movement of the train.*"

This is not the fact. In carrying out Ring's di-

rections to uncouple a locomotive engine from a train of forty cars *standing still on a side-track, Ring could not anticipate any movement of these cars.*

> "I sent this brakeman, Ring, over to tell the head man to get where he could make signals as we would have to get chains and put them on and back up and pull it into the side-track" (34).

This was the movement that took place *before* Ring was killed.

Furthermore, O'Leary testified:

> "I told Ring and the rear brakeman *after* we pulled the train in, we would *switch it out of the train*" (35).

It is not a fact, therefore, that Ring gave *any direction* regarding the *movement* of the train *after* Ring was between the ends of the cars. Both Ring and O'Leary had been between the cars on the side-track for some time before the *movement* due to the uncoupling, occurred.

ARGUMENTS, POINTS AND AUTHORITIES.

Specification of Error III and the subdivisions thereof are to the effect that the facts do not bring the case within the Safety Appliance Act.

On page 10 of petitioner's brief, it is said:

> "The car had come to rest on the side-track and had ceased to be used as contemplated by the act."

THE FEDERAL STATUTE.

Petitioner claims the Safety Appliance Act has no application to the facts as they appear in this case:

Section 2 of the original Safety Appliance Act, approved March 2nd, 1893, is as follows:

> "Sec. 2. On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be *hauled* or *used* on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be *uncoupled without the necessity of men going between the ends of the cars.*"

Section 8 of the act does away with the defense of assumption of risk.

By the Amendment of 1910, it was provided that a car subject to the act, if found defective, could be hauled to a repair point, but it was further provided that:

> "Such movement or hauling of such car shall be *at the sole risk of the carrier,* and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe (a) by reason of *or* (b) *in connection with* the *movement* or *hauling* of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by

> means of chains instead of draw-bars, in revenue trains or in association with other cars that are commercially used, unless such defective car contains live stock or 'perishable' freight."

The petitioner is an interstate carrier and decedent was engaged in interstate commerce at the time in question. Does the statute pertaining to couplers and draw-bars apply to the situation found to exist at Budd, Iowa, when decedent was killed?

On the question of the applicability of the statute, counsel claim the case is governed by *McCalmont v. Penn. R. Co.*, 273 Fed. 231, and *Boldt v. Penn. R. Co.*, 245 U. S. 441. Neither decision is in point, as will be pointed out hereafter.

The Supreme Court of Minnesota held the statute was applicable, and held that the car had not yet come to rest but was *in use* within the meaning of the act, saying:

> "1. Do the facts bring this case within the provisions of the Safety Appliance Act? The defendant asserts that nothing happened while this car was chained up and hauled on to the side-track, and that it there came to rest, and that it at that instant ceased to be 'used' by the carrier. It attempts to put this defective car in the status of the car in *McCalmont v. Penn. Ry.*, 273 Fed. 231, affirmed 283 Fed. 736, wherein a car was placed on a dead track where an employe was later injured. In this case the defective car was not yet placed to be left and in fact the equipment, the chain, used to replace the defective coupling, was still intact and the car remained in the train of which it was a part. There was here no break in the

> chain of events between the pulling out of the draw-bar and the injury. * * * Clearly the facts bring this case within the Safety Appliance Act. *Otos v. Great Northern Ry. Co.*, 128 Minn. 283, 150 N. W. 922, 239 U. S. 349; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476; *Goneau v. M., St. P. & S. S. M. Ry. Co.*, —— Minn. ——, 191 N. W. 279; *Frye v. C. R. I. & P. Ry. Co.*, —— Minn. ——, 195 N. W. 269" (599-601).

That the record sustains the conclusion of the Minnesota court is clear from the statement of facts heretofore made.

If the record does sustain this conclusion of the Minnesota Supreme Court, manifestly there is nothing tenable in the contention of petitioner.

Petitioner insists that the Minnesota Supreme Court is in error in the statement as to what the facts were and as to the conclusion of law which must necessarily follow. This is said to be true because the case is ruled by *Penn. R. Co. v. McCalmont, supra.* The McCalmont case is not in point. There the court was dealing with an entirely different state of facts. In the opinion the court said:

> "The defendant was *not hauling* it or permitting it to be *used* or hauled on its line. It had *taken it out of use* and had placed it on a *dead track*, and the hauling or the *movement* of it * * * was *not in immediate contemplation.*"

It may be conceded that if a defective car should be taken to a side-track and left there and *not used* and *not moved,* and later, when *no movement* of the

car was *in contemplation,* an employe should be injured, the statute might have no application, but it is not necessary to consider that question in the case at bar.

The defective car was *not* placed on a *dead* track. Even under the statement of facts of the petitioner, on page 2 of the brief, it appears that there had to be a *movement* of the cars connected to the bad-order car *before it was* to be taken out of the train.

Under the testimony of the conductor, O'Leary, and this was not disputed or questioned, the *work had not been completed*, the *movement* was *not completed,* and the crew *contemplated* taking the car in question *out of the train.* It was to be *further switched. It had to be moved. It had to be hauled* and was clearly *in use* within the meaning of the statute.

Whether the decision of the McCalmont case be correct or not, whether it involves too narrow a construction of the Safety Appliance Act, is of no moment. *The facts in that case are not similar to the facts in the case at bar.*

In the portion of the decision quoted in petitioner's brief, at the bottom of page 11, it is said that he, the employe in the McCalmont case, was merely *making temporary repairs to the car upon the dead track* so that at some future time it might be moved or hauled.

Counsel on page 12 of this brief then say that *the salient points* in the McCalmont case and the case at bar are the *same.*

Nothing could be further from the fact. This

statement is also made, "*as in that case,* the *car was out of service.*"

There is not *one word* of testimony in the entire record to sustain any claim that this car was *out of service.* The statement is *wholly incorrect* and entirely *without any* support.

The car in question was still in use. It had *not* been *disconnected* from the other cars in the train, which were being commercially used and moved.

The defendant had a right to move the car to the repair track without incurring a penalty, under the express provisions of the statute, but the car was nevertheless *in use,* and in the *movement* when the car was so *in use,* Ring was killed.

Congress, in passing the provision providing for the hauling of the car to a repair track, after it was found to be defective, gave to the carriers all the privileges needed or rights necessary to protect themselves from the penal provisions of the statute.

Congress also by the Amendment of 1910, placed the blame, in a remedial action by the employe, upon the carrier, rather than upon the employe, and said that such movement or hauling of a car *to a repair track should be* "at the sole risk of the carrier."

Was the car in question in use? Had its movement ceased? Was it placed at rest on a dead track?

We have made a most painstaking search of the record to find *anything* therein to justify the claim of petitioner that the car in question had ceased to be *used.*

This claim cannot be justified. *The movement was not over.* The car had to be unchained, the caboose taken from the end of the train, the defective car hauled out, and the caboose then placed at the rear of the train in question.

The attempt to unhook the car was made as testified by Conductor O'Leary, "*in order to get this bad-order car out of the train*" (69).

As to the purpose in unhooking the chain, O'Leary was asked:

> "Q. Did you have *any other object* or *purpose* in mind at the time you were doing that?
> A. No."

This question and answer followed the question above referred to wherein the witness was asked relative to *unhooking the car in order to get the bad-order car out of the train.*

If the car was not in use *when* did it cease to be in use?

The statute would be of no avail as a remedial act for employes, if it could be said that a car was *not in use* the minute it was found to be *defective.*

The defective car caused the death of Ring. Congress intended to protect employes when working *about* such defective cars.

The car must have been *in use* while the train was being *hauled to the side-track,* and after it was chained to the adjoining car.

The *movement of the car was not completed* after it came to the side-track.

It had *not been unhooked* from the adjoining car.

A *further switching movement was contemplated.*

There is nothing to justify any claim that while the conductor and Ring were working about this defective car, it was not in use.

There might possibly be some lack of definiteness in the record as to whether the defective car was to be actually hauled out of Budd or was to remain there.

At folio 69 this appears:

> "Q. Then what did you do with the bad-order car
>
> A. Set it behind the caboose and leave it there."

The tense of the question as well as of the answer might tend to mislead the court.

The intent of the question was, "What were you going to do with the bad-order car?" And then the answer, "Set it in behind the caboose and leave it there."

The record is not clear whether "leave it there," meant to leave it *behind the caboose* and *haul it with the train,* or *leave it* at Budd, but, in any event, there was *still a movement to be made* of the car and it was not at rest and was clearly in use at the time in question.

The case of *Boldt v. Penn. R. Co.,* 245 U. S. 411, cited on page 12 of petitioner's brief, is not in point and will not be of assistance to this court in considering any question there may be in the case at bar.

The right of recovery in that case was *not based upon a claimed violation of the Safety Appliance Act.* It is true there was a repair of a defective

coupler, but it was *not claimed* in that case that this defect had *anything* to do with plaintiff's injury.

As stated by Mr. Justice McReynolds:

> "Plaintiff maintained that the *brakeman* in control *negligently permitted the moving cars to strike with too great violence;* also the company *negligenly failed* to *promulgate* and *enforce adequate rules to* safeguard deceased."

There being *no statutory violation*, assumption of risk was an absolute defense under the federal statute. *The case did not involve the question of the cars being in use within the meaning of the Safety Appliance Act.*

The question of whether the car was in use was not considered by the court, *nor even referred to in the decision.*

A similar contention, although under a different name, was made by the plaintiff in error in *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322.

In that case, instead of claiming that the car was not *in use*, the claim was made that it had been *"withdrawn from interstate commerce,"* and that therefore plaintiff was not entitled to the benefit of the Federal statute.

In the Otos case a car with a defective coupling device was being hauled, under the direction of Otos, who was the foreman in charge of the work, to a side-track for repairs.

The railway company contended that under the law it could not *use* the defective car and *had to*

haul it to the side-track; that in hauling it to the side-track it was *but complying with the statute* and it could not be held liable for the accident which occurred while it, the carrier, was trying to comply with the terms of the Federal law.

It was claimed that when the movement to the side-track started,

> "*The car had been withdrawn from interstate commerce,* and that therefore the Act of March 2nd, 1893 * * * does not apply."

In considering that question, this court, speaking by Mr. Justice Holmes said:

> "*It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress.*"

In the Otos case, the early case of *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, was cited with approval.

In that case it appeared that a freight car loaded with interstate freight *was placed on a side-track in the railway yard at its destination to await simple repairs to the automatic coupler.*

The opinion of this court was written by Mr. Justice Harlan, who quoted the language of the Circuit Court of Appeals as follows:

> "'This is a case *peculiarly within the provisions of the act.* A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order" and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on *moving it about in*

> *connection with other cars,* and finally ordered the injured employe to couple it to another car. This he tried to do with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed.' * * * We concur with the majority of the court below that the car in question *was being used in interstate traffic when the plaintiff was injured.*"

In the Delk case it appeared that the car had come into the yards on *October 2nd,* had been delivered to the Belt Line Company and was returned by that company the next day because of the defective coupler; that on the morning of *October 4th,* while this car was being taken out of a string of nine cars, Delk was injured.

Under the holding in the Delk and Otos cases, as well as the plain terms of the statute, there is no question but that the car was subject to the act. It was still in use. It was not on a dead track. The movement was not complete.

It was in use at the time Ring was injured and the *movement* and *use* of it at the time gave rise to a cause of action under the statute.

It being clear that the car was *in use* within the meaning of the Safety Appliance Act, and that deceased was killed by the *movement* thereof, we pass to the next specification of error claimed by petitioner.

Specifications of Error I, II and IV.

Under this heading, it is said, "*The defective*

draw-bar did not proximately contribute to the injury in this case."

This action was founded on the Employers' Liability Law.

The "negligence" consisted in the violation of the Federal statute. The violation of the statute in and of itself is negligence within the meaning of that term, as used in the Employers' Liability Law.

See *San Antonio & A. P. R. Co.*, 241 U. S. 476, 60 L. Ed. 1110.

Section 1 of the Employers' Liability Law provides, so far as here material:

> "Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employe, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of its officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence."

Section 3 provides that contributory negligence shall not be a defense, and substitutes the doctrine of comparative negligence.

We quote from Section 3:

> "Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes *contributed to* the injury or death of such employe."

Section 4 provides:

> "Section 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes *contributed to* the injury or death of such employe."

At the top of page 14 of petitioner's brief, Counsel state:

> "The question of whether a particular act is remote or proximate is purely a *question of law.*"

This statement hardly squares with the fact. The question of proximate cause is essentially a fact question. This has been the holding of this court from the early Kellogg case, 94 U. S. 469, 24 L. Ed. 256, to the present. Citation of authority on the point is not necessary.

In considering whether or not the defect was the cause of the injury to and death of decedent Ring, we must bear in mind that the question of proximate cause was submitted to the jury by the trial court who said:

> "The proximate cause of an injury is that which causes it *directly* or immediately, or *through a natural sequence of events,* without the intervention of any other independent of efficient cause. The defective coupler may be found to be the proximate cause of decedent's injury if it was a direct and immediate cause

without which the injury would not have occurred" (522).

Respondent contends:

1. That the defective appliance was the proximate cause of the death of Ring.

2. That under the Federal statutes the defect need not be the sole proximate cause of an injury or death, but that it is sufficient if such injury or death result "in whole or in part" from the defect, or if the defect be *one* of the proximate or concurring causes.

1. *The defect was the proximate cause of Ring's death.*

In the case of *Great Northern R. Co. v. Otos, supra,* it appeared that Otos went between the ends of moving cars. There was a defective coupler. While between the ends of the cars, his foot caught in an *unguarded frog* and his leg was run over.

The court submitted the case to the jury solely on the question of the violation of the Safety Appliance Act and the question whether or not that was the proximate cause of his injury.

In considering the question of *proximate cause* this court, speaking by Mr. Justice Holmes, said:

> "Under the instructions of the court *the jury must have found that the defect was the proximate cause of the injury as that was made a condition of the plaintiff's right to recover.*"

A consideration of the question of proximate cause in the case at bar brings us, to a degree, back

to a consideration of the question of whether the car was *in use.*

Defendant contends that the car was not in use and that the defect, as an active force, had ceased, "when the car had come *to rest* on the side-track" (page 14, Petitioner's Brief).

Petitioner contends that there were three active forces intervening subsequent to the defective draw-bar:

1. The direction of Ring to the brakeman, Quist.
2. The fact that Ring placed himself between the cars in violation of the rule.
3. Ring's actions in not getting out from between the cars *quickly enough* after they started the backward movement.

In answer to Proposition 1, relative to the directions Ring gave to Quist, nothing more need be said than that, under the facts in the case, *Ring did not give to the brakeman, Quist, any direction to move the cars after he, Ring, was between the ends thereof.*

As the statement of facts shows, the *only* direction that Ring gave to Quist was when Ring, speaking *for his superior officer, the conductor,* told Quist to *disconnect the engine* from the train which was *standing still.* This was all Quist had to do.

Proposition 2, so far as it involves the question of rules, has no application to the situation that existed. This is true because *Ring did not expect or contemplate any movement* of the cars *while he was between the ends thereof.* Furthermore, the

rules would not be admissible *for any purpose* under the many decisions of this court.

We will refer to this later.

As to Proposition 3, regarding *getting out from between the cars,* the act of Ring could *at most be an act of contributory negligence.* If he failed to get out with the alacrity which he should have, his failure could not effect his right of recovery in view of the plain words of the statute doing away with the defense of contributory negligence.

In considering each of the propositions as to proximate cause, we must first *assume that the statute applied to Ring and the situation existing at Budd, Iowa.*

Assuming this, there was a *primary right* of cause of action in favor of Ring's administrator. This being true, any defense of assumption of risk or contributory negligence would be unavailing and any act of decedent contributing toward his injury could not defeat his recovery.

Counsel state that the proximate cause of the death of decedent Ring was not the defective appliance, but the subsequent *movement* of the car.

Such argument has little merit. To answer it we need only revert to the *purpose* of the statute. The purpose of the statute was to require the carrier to maintain its equipment in such condition that an employe *would not need to go between the ends of the cars.*

The duty of the carrier was made *absolute* so that the employe would not need to show failure to inspect, lack of care, or other breaches of the

common law duty devolving on the master.

To say that the *movement* of the car was the *cause* of the injury, and not the defective appliance, is to lose sight of the purpose of the statute.

The *defective draw-bar* did not injure any one. A defective coupler *in and of itself* could rarely be the direct cause of an injury to an employe.

The injury, of necessity, must come from the *movement* of the cars, which follows the act of the employe in going between the ends thereof. It is not the defective appliance *of itself* which causes the injury.

The draw-bar did not run over Ring. The draw-bar did not fall on Ring, but *it was the movement of the car* which was made when he was between the ends of the cars which *brought about, produced* and *occasioned* the injuries resulting in his death.

It would be absurd to say that there could be no recovery because the draw-bar did not fall onto Ring and crush him. It would be equally absurd to hold that a switchman could not recover where he was injured because of a *defective coupler* when he stepped *between the ends of the cars* and attempted the coupling by hand.

In both the cases mentioned neither the *draw-bar* nor the *coupling* device *in and of themselves* caused the injury to the employe.

The injury was caused by the *movement* of the car. The *movement* of the car was a *source of danger* to the employe, because the statute had been violated, and this violation required the employe to be *between the ends* of the cars. It was

the aim of the statute to prevent any occasion of this kind. The statute was designed to protect employes from the likelihood of injury, not from *standing cars,* not from couplers or draw-bars, but from *moving cars,* between which employes were obliged to be because of defective appliances. This contention cannot be refuted. The amendment of 1910 to the Safety Appliance Act, providing that the carrier shall not be relieved from liability "in connection with the movement * * * of such car" shows the congressional intent. Congress intended to give a remedy to employes injured by moving cars which were used contrary to the statute. There can be no other construction of the statute and it cannot be that liability can be avoided under the guise of proximate cause because the coupler or draw-bar did not *itself* injure the employe.

In the case of *Great Northern R. Co. v. Otos,* hereinbefore referred to, the same question of proximate cause was urged upon this court. In the transcript of the record in that case, page 214, assignments of error V and VI are given, which are as follows:

> "V. The said Supreme Court erred in holding that the *proximate cause* of the injury of defendant in error was the defective condition of the coupling apparatus, where it appeared that at the time defendant in error was injured he was engaged in *violating one of the rules* of the plaintiff in error."
>
> "VI. The said Supreme Court erred in holding that the proximate cause of the in-

> jury of defendant in error was due to a violation of the Federal Safety Appliance Act."

In support of both of these assignments of error it was contended that some *intervening cause* or *violation of a rule* or the *catching of plaintiff's foot in the frog* was the proximate cause of his injury.

This court paid little heed to the claim, holding that inasmuch as the question was submitted to the jury, *"the jury must have found the defect was the proximate cause of the injury as that was made a condition of the plaintiff's right to recover."* It could be said in the Otos case, with as much reason as in the case at bar, that the defect was not the proximate cause of the injury, but the proximate cause was the unblocked frog.

To revert now to the question of rules for a moment, the answer of the Supreme Court to the claim that the violation of the rules was the cause of the injury was given in the Otos case as follows:

> "The fact that plaintiff's conduct *contributed* to the result was *not a defense.*"

The court cited with approval *Grand Trunk W. R. Co. v. Lindsay,* 233 U. S. 42, 58 L. Ed. 838, wherein the court said that plaintiff's act, if *one of contributory negligence, could not be called the proximate cause so as to defeat his right of recovery,* when it could *not* be defeated by calling the *same act* contributory negligence.

So far as the question of rules is concerned, if they had *any application to the situation,* which

they do *not,* they, nevertheless, could not be considered for any purpose, because a violation of the rules could at most be *contributory negligence* and this, under the statute, would not constitute a defense.

The record in the Otos case showed that Otos had received and acknowledged receipt of a rule saying that employes should not go between *moving cars* to make a coupling or uncoupling.

Nevertheless Otos did go between the ends of moving cars, and he was injured.

The court held the rule could not defeat his recovery.

It would be an anomaly to say that an employe could go between the ends of *moving* cars in plain violation of a definite rule and still have a right to recovery, but if he went between the ends of cars which were *standing still,* in violation of a vague rule, that this would *bar him from recovery.*

There is no merit in the contention of petitioner regarding the rules. It is to be remembered that decedent did not go between moving cars. The rules had no application to his situation.

Defendant offered in evidence the two rules, one known as Rule No. 707, which appears at folio 267 of the record, and is as follows:

> "707. Employes must not assume that signals given an engineman have been seen and will be obeyed when obedience to those signals on the part of the engineman is essential to the safety of such employes in the performance of their duties. They must know that the signal has been seen, understood and obeyed,

> before placing themselves in a dangerous position, otherwise they assume all risks of danger arising from any misunderstanding or disregard of signals."

The other rule was known as Rule No. 703 and appears at folio 279 of the record which is as follows:

> "703. Persons accepting service will be deemed to have full knowledge of the dangers and risks incident to the service. They agree to exercise due care in the performance of their duties to prevent accident to themselves or others, and, before using them, to see that the machinery, tools, appliances and materials are in a safe condition to perform the service required."

Rule 707 is to the effect that employes must know that signals to enginemen have been seen, "before placing themselves in a dangerous position."

This rule had no application to the facts in the case at bar because, leaving aside the Federal statute for a moment, the train in question was standing still and there could be *no movement* of the train except upon the direction of the conductor, O'Leary.

In this connection it is to be remembered that whatever directions Ring gave to Quist were given to Quist because O'Leary, the conductor, had directed Ring to give the order to Quist. This order was, as has been before stated, *simply to uncouple the engine from the train of cars which were standing perfectly still.*

This rule, therefore, could have no bearing whatsoever.

As to Rule 703 this is simply a statement that employes will be *careful* in the performance of their work. There is no evidence in this case that decedent did anything that the ordinary employe would not have done when he went between the cars *while they were standing still,* at the command of his superior, the conductor.

Finally, on the question of rules, if it be conceded that the defect was one of the causes which "in whole or in part" produced the injury to and death of decedent, then, even though the violation of the rules also contributed to bring about such result, the petitioner would still be liable.

The case must turn largely on the applicability of the Safety Appliance Act. If the car was in use and its *movement* "in whole or in part" caused Ring's death the questions raised by petitioner are of no importance.

Assuming a *primary* violation of the statute and use of the car, liability must follow. If there be no such primary liability, no *use* or *movement* of the car, then the petitioner would not be liable. This would be because the car was not subject to the act, and not because of any rules, nor because of any doctrine of proximate cause.

The rules are of no consequence. This statement is further borne out by Section 5 of the Employer's Liability Act, which provides:

> "Any contract, rule, regulation or device whatsoever the purport or intent of which

shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

2. *The defect need not be the sole proximate cause. "In whole or in part."*

So much has been said by counsel for petitioner regarding proximate cause that we shall proceed to a consideration of the statute that we may determine therefrom what rule Congress has provided, whether it is essential that the defect be the sole proximate cause.

In Section 1 of the act, it is said that the carrier shall be liable for such "death *resulting in whole or in part* from the negligence" of the carrier.

The words, "*in whole or in part*" were put into the state for a purpose.

Counsel in their brief say that *the statute has not changed the rule of the common law as to proximate cause.*

As to this we take issue with counsel. *The rule as to proximate cause has been changed by the statute.*

Not only in Section 1 are the words, "in whole or in part" used, but in Section 3 of the Employers' Liability Act, it is provided that an employee cannot be held guilty of contributory negligence in any case where the violation of a statute by the carrier *contributed to* the injury or death of such employe.

The same thing is found in Section 4 doing away

with the defense of assumption of risk where a statutory violation *contributed* to the injury or death.

The use of the words, "*contributed to,*" in both Sections 3 and 4 is significant.

Taking these words in conjunction with the words, "in whole or in part," as used in Section 1 of the statute, it is clear that the negligence of the carrier need not be the sole and only proximate cause of the injury in order to enable plaintiff to recover.

This is apparent from the many decisions of this court.

Did the death of Ring result *in whole or in part* from the defective coupling appliance?

Section 1 of the Employers' Liability Act uses the word "resulting" before the words "in whole or in part."

This can mean only that there is a liability on the part of the defendant if the statutory violation is one of the proximate or *producing* or *concurring* causes of the injury.

Did the injury result from the defect in whole or in part?

To say that the defect must be the *sole* and only proximate cause would be to give no effect whatever to the plain wording of the statute.

In the very recent case of *Davis v. Wolfe*, 44 S. C. 64, decided November 12, 1923, this court in an opinion written by Mr. Justice Sanford, had occasion to consider proximate cause and in that case the court said, after referring to many early cases:

"The rule clearly deducible from these four

> cases is that, on the one hand, an employe cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not *a* proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is *a* proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

In the quotation above given, it is to be noted that Mr. Justice Sanford uses the article "a" instead of the article "the," saying that there can be a recovery if the statutory violation is "*a* proximate cause of the accident." It is also said that the statutory violation would not permit a recovery if it did not constitute "*a* proximate cause of the accident." In both instances the article "a" is used.

In addition to this, the case of *Lang v. New York C. R. Co.*, 255 U. S. 455, 65 L. Ed. 729, was quoted, in which it was said that "necessarily there must be *a* causal relation between the fact of delinquency and the fact of injury."

In conclusion, Mr. Justice Sanford said:

> "It results that in the instant case, as there was substantial evidence tending to show that the defective condition of the grab-iron required by Section 4 of the Safety Appliance Act was *a* proximate cause of the accident re-

> sulting in injury to Wolfe while in the discharge of his duty as a conductor, the case was properly submitted to the jury under the act."

It is to be noted that the court used the words, "*a* proximate cause of the accident." Four times in this opinion the article *a* is used in reference to proximate cause.

In the Wolfe case the Supreme Court quoted with approval the Minnesota case of *McNaney v. Chicago, R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650. In that case the Supreme Court of Minnesota said:

> "In the absence of a contrary ruling by the Supreme Court of the United States, construing the Safety Appliance Acts with reference to the proposition here involved, we think it should be held that if the grab-iron was insecure and such insecurity was *the* proximate cause or *one of the proximate causes*, of plaintiff's serious injury, defendant is liable."

Here the court recognized that there could be a recovery if the violation was one of the proximate causes.

The question of proximate cause was considered in *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, *supra*.

In that case the Circuit Court of Appeals, 217 Fed. 524, held that *the statute entirely eliminated the element of proximate cause where there were concurring acts of the employer and employe which contributed to the injury or death of the employe.*

When the case came before the Supreme Court

of the United States, the opinion being written by the late Justice Pitney, reference was made to the position of the Circuit Court of Appeals, and this was said:

> "*We agree with this* except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are *concurring proximate causes*, it is plain that the Employers' Liability Act *requires the former to be disregarded.*"

Under the Employers' Liability Law, in view of the use of the words, "in whole or in part," Congress did not intend that in order for a plaintiff to recover defendant's violation of a statute had to be the *sole and only* proximate cause.

The words, "in whole or in part" would have *no meaning* in the statute if petitioner's position be correct. A construction of the statute which would give to plain words *no meaning* is not to be considered, when the statute can be construed so as to give effect to these plain words and the apparent intent of Congress.

Furthermore from the Campbell case and from the language of Mr. Justice Sanford in the Wolfe case, it is clear that this court, in construing the statute, was of opinion that *there might be more than one proximate cause of an accident.*

The defective safety appliance might be *in part* a cause of the accident, and the act of the decedent, Ring, might be *in part* the cause. If this be true,

a recovery may be had under the act.

In view of the questions raised by petition and their importance to the large body of railway employes governed and protected by the provisions of the Employers' Liability Law and the Safety Appliance Act, we feel that this court should unequivocally make its position plain on a very vital question upon which this court has not decisively spoken as yet.

Much confusion has arisen over the question of proximate cause in actions arising under the Employers' Liability Law, as well as under the provisions of the Safety Appliance Act.

The history of the efforts made to secure the passage of these laws, the consideration of the messages of a large number of Presidents to Congress, urging them to pass legislation of this character; the hearings before the senate and the house committees, clearly show that by the pasasge of these laws, it was the intent and purpose of congress to do away with the harshness of the common law rules relating to liability of the master to an employe.

By the Employers' Liability Law, congress clearly expressed its intention to do away with the Fellow Servant rule.

In cases where there has been a violation of a Safety Appliance Act, Congress denied to the carrier the defenses of assumption of risk and contributory negligence.

It must, therefore, be apparent to the court that the purpose of Congress, as so frequently stated by our courts, was to provide a different mode and

method of recovery than theretofore existed at the common law.

There has been much confusion of thought on the issue of proximate cause, doubtless due to the fact that a distinction has not been clearly made and clearly understood between actions at common law and actions arising either under the provisions of the Employers' Liability Law or the Safety Appliance Act.

When Congress passed the Employers' Liability Law, they used this very significant language—that the employer should be liable for any injury or death "resulting in whole or in part" from the negligence of any of its officers, agents or servants.

This language had an intent and a purpose.

If Congress had intended to *confine the right of recovery* to the old common law doctrine of proximate cause, with all of its metaphysical intricacies and difficulties of application, it could easily have said that the employer would be liable for any injury *"caused by reason of such negligence."*

There was a purpose in using the words, "resulting in whole or in part" and no other purpose can be given these words than that it was the clear *intention of congress* to *modify and ameliorate the harshness of the doctrine of proximate cause* as applied in the various courts of this country and differing, as it necessarily does, with the viewpoint of the judge who tries the case.

This court is well aware of the fact that where a trial judge might hold as a matter of law, that an act *was* or was *not* the proximate cause, that

very frequently the appellate court does not disturb such a finding on the ground as laid down in *Great Northern R. Co. v. Knapp,* 240 U. S. 464, 60 L. Ed. 745 and *Beecroft v. Great Northern R. Co.,* 242 U. S. 18, 61 L. Ed. 530, that it is a matter primarily for the trial court, with which this court will not interfere and unless, as stated in those opinions, "plain and palpable error appears."

Consequently, it is important, and in fact essential, that on this question of proximate cause, or as to the negligence which brings about a condition which "results" in injury, that there should be a *final and uniform determination* for the guidance of the courts, both State and Federal, in this Nation.

If such negligence, or violation of the Safety Appliance Act, brings about a condition which "results" in injury to an employe engaged in interstate commerce, then liability follows as a matter of law.

Otherwise, the words "resulting in whole or in part" are not given their intended or natural meaning.

It must be clearly borne in mind in the discussion of these matters, that different rules of liability apply and are in force, depending upon the determining fact as to whether or not the employe is, or is not engaged in interstate commerce.

In other words, where the employe is engaged in interstate commerce, there is much broader language, as affecting his right to recover, than where he may be engaged in intrastate commerce, but is

entitled to recover because of a violation of some of the Safety Appliance Acts applying to interstate carriers, within the doctrine of *Texas & P. R. Co. v. Rigsby,* 241 U. S. 33, 60 L. Ed. 874, and kindred cases.

To illustrate, a man may be injured while engaged in intrastate commerce, by reason of the violation of the Safety Appliance Law. Under such conditions, certain defenses are available and certain defenses unavailable.

For example, a man *not* engaged in intrastate commerce who is injured by reason of the violation of the Safety Appliance Act upon an interstate railroad, is confronted with the following situation:

First: The company is liable for any defect which is the *proximate cause* of the injury to the employe.

Second: Contributory negligence is an absolute defense.

Third: The defendant is denied for any purpose the defense of assumption of risk by reason of the provisions of Section 8, of the Safety Appliance Act.

Now, then, to show the purpose of Congress, if the same employe is injured while *engaged in interstate* commerce and injured as a "result" of the violation of the Safety Appliance Act, we find the following situation:

First: The defendant is made liable not only for a defect which is the *proximate cause* of the injury, but it is clearly provided under the Employers' Liability Law, that the employer is made liable for any injury *"resulting in whole or in part"* from

the negligence of any of the officers, agents or servants of the employe.

Second: Under such circumstances, the defendant employer cannot avail itself for any purpose of the defenses of contributory negligence, or assumption of risk.

Where an employe is engaged in *intrastate* commerce and is not injured by reason of the violation of a Federal Safety Appliance Act, but because of the negligence of the carrier he must look to the law of the state in which he is injured for recovery and, in some instances, he comes under the provision of a state compensation law, which arbitrarily compels compensation to a limited extent.

In other states, he comes under the provisions of laws similar in import and in effect to the Employers' Liability Law.

When there are no such statutes the employe is left to his common law remedies and all the common law defenses are available to the carrier.

It must be apparent to this court, in view of this situation, that when Congress used the very significant language it did in the Employers' Liability Law, "resulting in whole or in part" that it intended to *modify and limit the harshness of the common law* doctrine of proximate cause.

From the multitude of decisions and the disharmony of the holdings of various courts in confusing the question of "condition" and "proximate cause," it is plain that Congress must have had a *purpose* in using the language it did.

Otherwise, Congress would have used the word

"caused" by reason of the negligence of any of the officers, agents or servants. The very fact that it used different language, clearly indicates a legislative *intent* to apply a *different rule* as to liability, namely, that the employer be liable for any injury *resulting,* or, "which is brought about" by reason of the negligence of any of the employes, officers, agents or servants of the carrier.

To hold otherwise would be to leave to the various courts both State and Federal with different holdings as to what constitutes proximate cause, with a diversity and variety of opinions, the determination of the question of liability under this statute. This must necessarily prevent a uniform application of the provisions of the Employers' Liability Law, which should be uniform over the entire Nation. It cannot be that Congress intended to permit such an uncertain condition to exist. Unless this court definitely and unequivocally passes upon and determines this very vital question of proximate cause it is inevitable that this situation will continue.

This court is well aware of the fact that in different State courts, as well as in different Federal courts, there are various and conflicting holdings as to what may, or may not constitute proximate cause.

The very result obtained by leaving the question of proximate cause to be decided in various jurisdictions in various ways tends to prevent the universal and uniform application of a law which is intended to have uniform application and to give

to an injured employe in one state the same rights, and exactly the same rights, given to such employe in another state.

For instance, if the courts of Minnesota should hold that certain facts raise a question for the jury on the issue of proximate cause and that a certain defect bringing about the injury was not merely a "condition" but *the* proximate cause of an injury, then, the injured employe would have a right to recover.

While on the other hand, if the courts of New York, upon the same state of facts, should hold that the thing which produced the injury was not the proximate cause, but merely created "a condition," then the employe in New York, on the same state of facts, would be denied a recovery.

And this court under the holding in the case of *Great Northern v. Knapp* and *Beecroft v. Great Northern, supra,* would necessarily refuse to review such a holding of the State court.

This is what is continually occurring in the courts of the various states and the Federal courts because there is no authoritative determination of this question and no construction of the language used by Congress in Section 1 of the Employers' Liability Law, namely, "resulting in whole or in part." This very condition impels us to suggest the propriety of this court of passing upon this question, so that there may be uniformity of the holdings thereon.

Not only is there lack of uniformity in the holdings of the different state courts; not only are the

holdings unharmonious and conflicting, but so, also, are the holdings of the Federal courts in the various circuits. This, of itself, is warrant sufficient for this court to finally pass upon this question and pronounce a rule for the guidance of the bench and bar of the country.

If it be held that the words "in whole or in part" are to be given their natural meaning the question will be solved and the confusion ended. Some courts now hold the defect must be the proximate cause, others that it be sufficient if it be *a* or one of the proximate or concurring causes. Some courts are in accord with theory of petitioner, that the common law rule as to proximate cause has not been ameliorated or changed by the statute.

In the case of *Erie R. Co. v. Russell,* 183 Fed. 722, the court held that the violation of the Safety Appliance Act was the thing which *"brought about the result,"* and the holding in that case clearly showed an intention upon the part of the court to give effect to the words "resulting in whole or in part," and yet a reading of the facts will clearly convince this court that in many jurisdictions courts would have held that the claimed violation of the Safety Appliance Act merely created "a condition" which brought about the injury but was *not* the proximate cause thereof.

It is for this reason that the Supreme Court of the United States should authoritatively and finally settle this question, in order that injured employes all over the nation have the same and not different rights of recovery, and in order to give to the pro-

visions of this law universal and uniform application.

Only recently counsel for respondent had occasion to try a case in the State of Michigan, involving a violation of the Federal Safety Appliance Act relating to the train brakes.

The short facts in the case were these: The train brakes failed to work and did not effectively operate on the train and a brakeman, in the performance of his duty, proceeded "to bleed the air," and in doing this work it was necessary for him to walk along by the side of the cars, take a hold of a "bleed cock" and pull the same, thus releasing the air and enabling the train to operate properly.

There was no dispute about the failure of the train brake equipment to work, nor of the necessity of the injured man "bleeding the air."

While this brakeman was in the act of "bleeding the air," and while he had a hold of the bleed cock for the purpose of remedying an admittedly defective condition brought about by a violation of the Safety Appliance Act, he stumbled and fell over an obstruction on the right-of-way and was thrown under the cars and his leg was taken off.

Upon the trial of that case, the defendant railroad company contended that the "proximate cause" of his injury was the fact that he fell over an obstruction on the right-of-way and that the defective condition of the braking equipment, or the fact that he was "bleeding the air" and remedying the defective condition of the brakes, was not "in whole or in part" the "proximate cause" of his accident

and injury and the defendant induced the trial court to take the position, under some of the decisions of the State of Michigan, that the defective brakes merely created "a condition," but were not "in whole or in part" the "proximate cause" of the accident.

This is an extreme case and yet the trial court in Michigan was prepared to sustain the contention of the defendant and deny to plaintiff the right to ever have a jury pass upon the question of whether or not the defective condition of the braking equipment "contributed" to his injury or whether or not his injury "resulted in whole or in part" from the violation of the law.

Then the plaintiff, under the practice in the state of Michigan, the court having indicated what his ruling would be, availed himself of the privilege of dismissing his case, which was then commenced in the Federal Court of Michigan, so that plaintiff might more easily secure a direct ruling by the Supreme Court of the United States on this very important question.

In that case, it was plaintiff's contention that there must be some meaning given to the word "contributed" and to the words "resulting in whole or in part," and of course the only meaning or construction that could possibly be given to these words, would be that the defective air braking system brought about the "result" or in other words, that the injury "resulted in whole or in part" because of the defective braking equipment. Had there been a holding by the Supreme Court of the

United States construing this language, this situation would not have arisen. This is only one of hundreds of cases where the courts, under the guise of a strict construction of proximate cause, deny recovery to the injured employe in one jurisdiction, while under the same state of facts in another jurisdiction, a recovery can be had.

The Safety Appliance Act was amended in 1910, the amendment having heretofore been quoted in this brief.

We wish to once more call attention of the court to the very significant language contained in the amendment, to-wit:

> "Such movement or hauling of such cars shall be at the *sole risk of the carrier* and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe (a) *by reason of;* or (b) *in connection with the movement* or hauling of such car with equipment which is defective, etc."

There are three significant factors to be considered in construing this amendment:

1st: That the movement or hauling shall be *at the sole risk of the carrier.*

2nd: That the carrier shall not be relieved from liability for any injury caused to such employe *by reason of the movement or hauling* of such car.

3rd: That the carrier shall not be relieved from liability for the injury to an employe *"in connection with"* the *movement* or *hauling* of such car.

The words, *"in connection with,"* are significant.

It clearly was the congressional purpose, as appears by this amendment, to make the hauling of a defective car an act at the peril of the carrier, so far as remedial actions of employes were concerned.

And in such actions the employe was to have all the rights given by the statute, even though the car was to be taken to a repair track. If the employe received an injury by reason of the *movement* of that car, or in *connection with* the *movement* thereof his right of action could not be defeated.

This statute, when taken *in connection with* the Employers' Liability Law, wherein it is provided that the carrier shall be liable for an injury resulting *"in whole or in part"* from the negligence of the carrier, and when taken in connection with Sections 3 and 4 of that statute which provide that the defenses of assumption of risk and contributory negligence shall not be available where the violation of a statute by the defendant *"contributed to the injury or death of such employe,"* clearly shows that the common law doctrine of proximate cause *does not have its full force in an action under these statutes.*

Congress would not have used the words in the Amendment of 1910, *"in connection with"* unless there was a purpose in using such language.

Had Congress intended that the common law doctrine of proximate cause should have its full force and effect in actions under the Federal statute, the Amendment of 1910 might well have provided that "nothing in that section would relieve the carrier from liability to an employe for the injury *caused*

by the *hauling* or *movement* of the defective car."

Congress was *not content*, however, *with the common law rule as to proximate cause*, and did not merely make a provision that the injury had to be *caused by* the *movement* or *hauling* of the car, but *specifically said* that the liability would follow for an injury caused to an employe *in connection with* or *by reason of* the movement or hauling of the car.

The words, "in connection with" do not need definition. Neither should they be subject to delimitation of their common meaning.

These plain words should be given the significance Congress intended them to have. Congress intended by the statute that any *movement* of a car which might *bring about an injury* to an employe, either directly or *in connection with*, such movement should give rise to a cause of action.

The use of the language, "in whole or in part," the language, "contributed to," and the language, "in connection with" shows that *the common law rule as to proximate cause has no application to an action under this statute.*

As stated in *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 557, 55 L. Ed. 582:

> "In the case before us *the liability* of the defendant does not grow out of the *common law duty* of master to servant. The congress, *not satisfied with the common law duty and its resulting liability*, has prescribed *the duty by statute*. We have nothing to do but to ascertain and declare the meaning of a few simple words *in which the duty is described*. * * * There is no escape from the meaning of these words. Explanations cannot clarify them, and

> ought not to be employed to confuse them or lessen their significance. The *obvious purpose* of the legislature was to *supplant the qualified duty of the common law* with an absolute duty deemed by it more must. * * * Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek *some unnatural interpretation of common words.*"

In line with the case just cited, the conclusion is inescapable, that it is not essential in order that there be a recovery where the Safety Appliance Act is violated, that such violation constitutes the *sole* and *only* proximate cause of the injury. *It is sufficient if it be one of the proximate causes,* if it be *a contributing cause,* if it *contribute in whole or in part.* The employe is entitled to recover, where the defect pertains to a car, for any injury arising out of or "in *connection with the movement* of such car."

Much is made by counsel for petitioner of the fact, or the claim, that the defective car was but the *occasion* of decedent being where he was, and not the cause proximately producing the injury.

The word "cause" is defined in Funk & Wagnall's New Standard Dictionary, "to be the cause or occasion of, produce, effect, *bring to pass.*"

The same authority defines the word "contribute" as *"to have a share in effecting a result."*

The word "occasion" is defined as "to cause or bring about by furnishing the condition or occasion needed for an action of a principal cause."

The definitions of the plain words used in the

various sections of the statute referred to, coupled with a common sense construction of these statutes, show that it was intended that *any* injury occurring to an employe in *connection with* the movement of a defective car, or occasioned by the movement of such defective car, "in whole or in part," would give rise to a right of recovery.

The movement of the car caused Ring's death. It cannot be said his death was not caused by or *in connection with* such movement of the defective car.

Did the defective car "in whole or in part" cause Ring's death? The question answers itself!

The other assignments of error are not of sufficient moment to justify argument.

Respectfully submitted,

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CHICAGO GREAT WESTERN RAILROAD COMPANY *v.* SCHENDEL, ADMINISTRATOR OF THE ESTATE OF RING, DECEASED.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 422. Argued January 6, 1925.—Decided March 2, 1925.

1. Where a freight car with defective automatic coupler was moved with the train from the main line to a siding to be cut out and left there, *held* that the use, movement or hauling of the car, within the meaning of the Safety Appliance Act, had not ended when a brakeman went between it and the next car to detach the chain and was injured by the movement of the car by gravity as the engine was cut off; that he was within the protection of that statute; and, under the Employer's Liability Act, his assumption of the risk, or contributory negligence in going between the cars with knowledge of the danger and without notice to the engineer did not bar his right of action. P. 291.

59 Minn. 166, affirmed.

CERTIORARI to a judgment of the Supreme Court of Minnesota which affirmed a judgment for damages recovered against the railroad company for personal injuries of a brakeman resulting in death.

Mr. Asa G. Briggs, with whom *Mr. Charles H. Weyl*, *Mr. Allan Briggs* and *Mr. Allen V. Junkin* were on the briefs, for petitioner.

The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the sidetrack and had ceased to be "used" as contemplated by the act.

The association of the word "used" with the words "hauled or permitted to be hauled on its line" clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the

place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement. *McCalmont* v. *Penn. R. Co.*, 273 Fed. 231; s. c. 283 Fed. 736.

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line. The car was then chained up and hauled onto the sidetrack, to be cut out of the train. During this movement nothing occurred. The car was safely hauled to a place on the siding where it was to remain. Having so been placed on this sidetrack, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case.

If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate. If they hauled the car they violated the act, and if they did not haul the car they violated the act. See *Boldt* v. *Penn. R. Co.*, 245 U. S. 441.

The defective draw-bar did not proximately contribute to the injury in this case. *Gilman* v. *Central Vermont Ry.*, 107 Atl. 122; *McCalmont* v. *Penn. R. Co., supra; Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444; *Rittenhouse* v. *St. L. etc. Ry. Co.*, 252 S. W. 945; *Davis* v. *Hand*, 290 Fed. 73; *Phillips* v. *Penn. R. Co.*, 283 Fed. 381.

The deceased would not have been in the position he was except for the defect in the coupler. Beyond this there is no connection between the defective coupler and his injuries. *Douglas* v. *Washington Terminal Co.*, 298 Fed. 199.

The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely, under all the circumstances, that it could not reasonably be foreseen. *Lang* v. *New York Cent.*, 255 U. S. 455. *Otos Case*, 239 U. S. 42, distinguished.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Supreme Court of Minnesota affirmed a judgment in favor of respondent for damages resulting from the death of his intestate, Ring, fatally injured while in petitioner's service and while both were engaging in interstate commerce. The original action was based upon the Federal Employers' Liability Act, c. 149, 35 Stat. 65, 66, and the Safety Appliance Act of 1893, c. 196, 27 Stat. 531, as amended in 1910, c. 160, 36 Stat. 298, 299.

While the freight train upon which Ring served as brakeman was upon the main line at Budd, Iowa, a drawbar pulled out of a car. Thereupon the crew chained this car to the one immediately ahead. The engine pulled the whole train onto the adjacent siding, which lies on a gentle grade, and stopped. The intention was to detach the damaged car and leave it there. The plan was to cut off the engine, bring it around back of the train, remove the rear portion, couple this to the forward portion and move on. Acting under the conductor's direction, Ring asked the head brakeman to tell the engineer to proceed; and then, without the knowledge of either of the others, he and the conductor went between the crippled car and the next one, in order to disengage the connecting chain. While they were working there the engineer cut off the engine, the car ran slowly down the grade, and Ring, caught by the chain, suffered fatal injuries.

A rule of the company provided that employees should advise the engineer when they were going between or under cars and must know that he understood their purpose before they put themselves in any dangerous position. Ring gave no such warning, although familiar with the rule and with the grade upon which the train stood.

Petitioner insists: (1) The facts do not bring the case within the Safety Appliance Act since the car had come to rest on the side-track and had ceased to be "used," within the meaning of the statute. (2) The defective draw-bar did not proximately contribute to the injury. (3) The violation of the rule by Ring constituted negligence subsequent to and independent of the question of a defective safety appliance and was a proximate cause of the injury.

It is provided by the original Safety Appliance Act—

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The amendment of 1910 directs—

"Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided,* That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section four of this Act, or Section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and

such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this Section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to. . . ."

The Employers' Liability Act provides that in an action under it for injury or death of an employee, "such employee shall not be held to have assumed the risks of his employment [or to have been guilty of contributory negligence] in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Former opinions have adequately explained the purpose of these enactments. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66; *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455; *Davis* v. *Wolfe*, 263 U. S. 239. *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617, must be understood as in entire harmony with the doctrine announced in *St. Louis & San Francisco R. R. Co.* v. *Conarty*, and not as intended to modify or overrule anything which we there said.

Under the circumstances disclosed, we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident. To cut this car out of the train so

that the latter might proceed to destination was the thing in view, an essential part of the undertaking in connection with which the injuries arose.

The things shown to have been done by the deceased certainly amount to no more than contributory negligence or assumption of the risk, and both of these are removed from consideration by the Liability Act. When injured he was "within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and draw-bars of standard height. . . . His injury was within the evil against which the provisions for such appliances are directed." *St. Louis & San Francisco R. R. Co.* v. *Conarty, supra.* He went into the dangerous place because the equipment of the car which it was necessary to detach did not meet the statutory requirements especially intended to protect men in his position.

We find no material error in the judgment below, and it is

Affirmed.